IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAVID W. WOOD	)	
	)	Civil Action
v.	)	No. 3:15CV594
	)	
CREDIT ONE BANK, N.A.	)	October 18, 2016

COMPLETE TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE M. HANNAH LAUCK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Leonard A. Bennett, Esquire
Consumer Litigation Associates
763 J. Clyde Morris Boulevard, Suite 1A
Newport News, Virginia 23601

Counsel for the Plaintiff

Christopher J. Sears, Esquire
Cipriani & Werner PC
Laidley Tower Suite 900
500 Lee Street E
Charleston, WV 25301

Lauren C. Mahaffey, Esquire
McGuireWoods LLP
2001 K Street, NW
Suite 400
Washington, DC 20006-1040

Counsel for the Defendant

DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

I N D E X

(The proceedings in this matter commenced at 10:30 a.m.)

THE CLERK: Civil Action 3:15CV195, David W. Wood versus Credit One Bank.

Mr. Leonard A. Bennett represents the plaintiffs. Mr. Christopher J. Sears and Ms. Lauren C. Mahaffey represent the defendant.

are counsel ready to proceed?

MR. BENNETT: The plaintiff is, Your Honor.

MR. SEARS: We are, Your Honor.

THE COURT: All right. Well, first of all, my apologies for delaying my entrance. I actually had to call up OSHA to see if it was going to be a violation to have my clerk carry these notebooks to the bench given the amount of information that you have presented to me. It took awhile to get them to answer, but, as you can see, we got approval. We have the notebooks on the bench and we will proceed. All joking aside, I am very sorry to delay you, and I am prepared to go forward.

Obviously, we have a series of motions in front of us. What I would not like to do is make a poor use of your time in evaluating these. Certainly I have reviewed them, and I have a sense about how I think we should proceed here, but I'd like to hear

from you all the order in which you think we should go because you may have opinions about that that I should take into account, and you may not agree about how we should go forward. So I'd like to hear from both of you, first of all, in that regard. And we'll ask the plaintiffs to start.

MR. BENNETT: Yes, Your Honor.

Judge, of course, if I knew what the Court preferred, that would be my choice, but I think that it makes the most sense, to the extent the Court needs argument on the motions that shape the evidence that it would consider on summary judgment, that those motions would be resolved first.

In that regard, we have the *Daubert* challenge of Mr. Lynn, and we have, I believe, Docket 72, which is the Rule 37(c)(1) motion, really to exclude the two West Point employees. But, of course, in terms of number of trees killed per strength of argument, then I think that we've already briefed it. So we would argue as long as the Court wants me to argue or rely on the Court's discretion or preference as to how we do so.

THE COURT: We also have before us a discovery dispute.

MR. BENNETT: We do. The only -- the Rule 72

motion is that dispute, and I would put that in two categories, the second of which I don't intend to argue, and we do not intend to press forward, and we are asking to withdraw as a basis for a motion. And that is the argument regarding the net worth challenge.

The other two matters regarding L. L. Woodson and Karen Schumacher, two West Point employees, really are 37(c)(1) motions. The Court knows better than I, but we didn't initially proceed with those as discovery motions. The Court may be aware that Judge Payne has found that the 37(c)(1) challenge to evidence offered in dispositive motion did not have to go through in his court the conventional motion to compel or even the local rule and Federal Rule 37 meet and confer process. But, of course, this Court asked us to do that. We did do that. But really it's just an objection to the use of that evidence on summary judgment. The Court has not set a trial, although, if we go to trial, I assume the date would be imminent, and that would be followed by our filing of motions in limine on that same question.

THE COURT: All right. So let me be clear with respect to what I characterize as the discovery dispute. So you are only withdrawing your objection

to request for production No. 15?

MR. BENNETT: Yes, Judge.

THE COURT: So that's moot.

MR. BENNETT: Candidly, it's because this court has a -- we should have moved more quickly on the request to produce the net worth information. So that's the reason that I'm withdrawing that at this stage.

THE COURT: Okay.

MR. BENNETT: The other issues all relate to, really, the only identified evidence the defendant seeks to use, it's identified for summary judgment, is the evidence from Schumacher and from Woodson. So that chart that the Court has has sort of a miscellaneous category, but it's really redundant with the Woodson and Schumacher paragraphs.

THE COURT: All right. So I'll hear from defense counsel at least as to the order of business.

MR. SEARS: Sure. With regard to the cross motions for summary judgment, it would probably make sense to take the liability, and then the damages. So that would be plaintiff's motion first, and then Credit One's motion.

As far as the discovery dispute and the *Daubert* motion, I know Credit One's motion for summary

judgment is not based upon Mr. Lynn's expert testimony. I don't believe that plaintiff's motion for summary judgment is based on Mr. Lynn's expert testimony. Therefore, I don't know that that's necessary to resolve the summary judgment.

With regard to the dispute, the discovery dispute, that's pretty easy to deal with. Maybe we could get that out of the way now. Other than that, I don't really have a preference other than the notion that maybe plaintiff's summary judgment should go first, and then ours, and then we could either do the *Daubert* issue at the end or before we get into the cross motions for summary judgment.

THE COURT: All right.

MR. SEARS: Thank you, Your Honor.

THE COURT: Uh-huh.

Well, I certainly do think that what I characterize as these discovery disputes or motions to exclude should be addressed first. It does seem to me that the *Daubert* motion could go either way, or *Daubert*. Someday I'll learn how to say that word. Because it doesn't seem that he has relied upon Mr. Lynn.

My sense about that, though, is it might take a little less time to do that motion, and sort of

clipping away at things might be better. It also seems that Mr. Lynn is here.

Is he planning on staying for the whole thing? And are you paying him by the hour? We might want to save that time. Why don't we handle the discovery disputes first, and then my inclination, out of courtesy to Mr. Lynn, and perhaps out of sort of a timesaving saving device we might go with him next, and then handle the more substantial issues after that. Not because they are driven by Mr. Lynn's testimony, but just for purposes of organization.

All right?

MR. SEARS: Sure.

THE COURT: So why don't we first talk about, essentially, the motion to exclude Sergeant Woodson's affidavit and testimony.

MR. BENNETT: May it please the Court, good morning. The background, I think, my smarter colleague had already briefed for Your Honor in our motion, but this is a Rule 37(c)(1) challenge to the use of two witnesses who were never identified as intended defense witnesses. And I'll make a distinction that, candidly, a number of defense opponents that we face have made, which is the distinction between knowing who has knowledge versus

knowing who the defendant intends to call as a witness.

Rule 26(a)(1) and its supplemental requirement 26(e) require that a party, plaintiff or defendant, identify for the other party the persons, documents as well, but for this motion the persons that it would intend to use in support of its position, its case. In this case, Credit One's defense.

Early in this case, Mr. St. George represented another defendant, and we learned that Midland, who was the credit card debt collection company that bought this same account, had a conversation with a Sergeant Woodson. So Ms. Rotkis and I telephoned on speaker phone, spoke to Sergeant Woodson. Sergeant Woodson provided us information and said, no, she had never said that our client was responsible for the debt, and that the reason that she had stopped doing any further investigation was because she found out our client was going behind West Point's back to go to New Kent County and then to Florida and try to prosecute the estranged mother in those other jurisdictions, and the challenge was: Where did he really live when this supposedly occurred?

This witness was not going to be somebody who was excited to support David Wood's case, and, thus, we never identified or never took the deposition and never proceeded to introduce Sergeant Woodson into the case. Her testimony, by our account, wouldn't hurt us, but it wouldn't help us, and the defendant made no, despite that we had identified this person as a person with knowledge, made no effort, at least to our eyes, of disclosing Woodson as an intended witness or otherwise bringing Woodson into its defense.

The first time that we understood that Woodson was going to be used in the defendant's defense was in the summary judgment motion's process. And that's important. It's an important distinction because the fact that we knew that Woodson had knowledge, we made a strategic decision, which we believed to be the correct one, that we weren't going to push and bring Woodson into the case. The defendant was not proceeding to bring Woodson into the case, and, therefore, we didn't discover further. We didn't push. We didn't challenge. And we did not otherwise seek to bring that person into the case. The witness wasn't going to help us, could marginally hurt us, and we didn't believe -- we thought we were better strategically with the defendant not having

called the witness to bringing her in. And that's different because the defendant's argument in opposition to our Rule 37(c)(1) challenge is you knew Woodson existed. You knew Woodson had some connection to the case. And that's absolutely true. And there are a lot of individuals who we knew had a connection to the case that neither party has deposed, that neither party has sought to do discovery from. In fact, there are plenty of individuals that neither party has even interviewed, I'm sure.

And Rule 26(a)(1) is more precise than people who might have some knowledge about a case. 26(a)(1) asks for your intentions. Who does the defendant intend to call in its defense or who it may call in its defense? You have a copy of the Rule 26(a)(1) disclosures that the defendant has served on us at Docket 73, 2. 73, Exhibit 2. You have the interrogatory responses at 73, 3. That latter one, even in a universe in which a defendant would have to identify only people with knowledge, the defendant never identified Woodson in its interrogatory responses either.

Now, there are plenty of cases. I would bet, Your Honor, 90 plus percent of the cases that come before Your Honor that you never see, we have the

parties not supplementing their 26(a)(1)s, but when they identify witnesses in interrogatory answers, that sort of takes the gas out of our argument. So if I was to come before you and say, They didn't formally serve a 26(a)(1) supplement or 26(e) supplement, I would have a defendant say, Judge, we sent them our interrogatory responses, and we very clearly identified this person as someone with knowledge that we thought important enough to put in our interrogatory responses.

In this instance, you don't have that. I don't think that Woodson changes the summary judgment battle, but Rule 37(c)(1), of course, is not -- it's just a simply binary remedy. It's not you didn't disclose, therefore you can't use.

It is possible that we -- that this could be cured before trial by having us -- giving us the opportunity to now conduct the discovery we would have conducted had the defendant said, Hey, we may use this person. But we certainly shouldn't have that evidence, though as marginal as it may be, a part of the summary judgment exchange.

And so if the Court does not automatically exclude, it would certainly be within its discretion to condition the use of those individuals on our

ability to now do what we would have done had the defendant timely identified the witness under Rule 26(a).

THE COURT: So, obviously, part of what they indicate is that they did disclose. So I guess you need to tell me why you have a dispute as to whether or not they disclosed or did not.

He says, On February 22, you disclosed Sergeant Woodson, and on March 28th, Credit One disclosed Sergeant Woodson in response to your first set of interrogatories.

MR. BENNETT: Your Honor has the interrogatory set. We certainly -- the answer is we knew that Woodson existed, and we answered that Woodson had knowledge. And there's no doubt Woodson had some knowledge. But, I mean, we just disagree. The defendant has never disclosed that witness.

The first time that we received -- that we saw anything regarding Woodson being used in defendant's defense was when we took the deposition of Mr. Lynn, which was I believe in August, and Mr. Lynn had seen a declaration, had seen it before we ever saw it, that the defendant had arranged and that you now see in summary judgment. That deposition took place August 25.

So it was we issued a subpoena prior to that to Mr. Lynn. We asked for documents that he had used. The defendant and Mr. Lynn produced those documents. So I believe it would have been within the period of roughly two weeks or so before that August deposition that we would have seen such a declaration.

I don't know what else to say to Your Honor. The defendant has never identified Woodson as its intended witness.

THE COURT: Well, can you respond to their argument that they don't need to if it's for impeachment only.

MR. BENNETT: Well, it's still -- if they have identified the witness as a person with knowledge for that purpose, for impeachment, then -- well, let me say this: We're not going to -- we don't want to win this case on technical enlargement. If they were to call Woodson for impeachment purposes only, that's an entirely different standard, and I don't think that we'd have an issue with that. I mean, there are legal arguments. There are rules-based arguments that we could still use to challenge that person, but I could not argue that Your Honor would be beyond reasonable discretion in permitting -- I mean, imagine if my client came up and said, I spoke to Sergeant Woodson,

and assuming the defendant didn't object on hearsay grounds, and Sergeant Woodson said this was the worst case of identity theft she had ever seen, and, clearly, I wasn't responsible, how could I credibly argue to Your Honor that they couldn't bring Woodson in at that point?

But I don't think that's the challenge that we have. It's the affirmative use in the defense. I don't think there's any basis for impeachment. I don't think there are many facts that are in dispute as to what occurred.

It's really the tone of Woodson. If you read that declaration, it's contrary to all that we understood that Woodson knew. Because the way the declaration is worded, it implies, it doesn't state, and by saying "I decline to prosecute," that somehow there's implied belief or an unstated conclusion that the West Point Police Department determined our client was lying. If Woodson wants to come here and say this person was lying, I mean, that's not what the evidence that you have in front of you. But you have this open-ended declaration that we can't rebut. Discovery was closed before we ever got that declaration or the identification of the witness as a case-in-chief or defense-in-chief --

THE COURT: Well, let me tell you this, and I'll ask your opposing counsel questions. But I do have something labeled "Defendant's Response to Plaintiff's Interrogatories," and it does indicate, "Identify all persons who have knowledge of the facts."

I'm not sure I have the whole document is one of the problems. But interrogatory 3 and their response, they list in letter I, Sergeant L. L. Woodson, and other employees, representatives, and custodian of records, who would be the other person, Schumacher, that you're challenging, they identify.

So is your dispute that that answer is not responsive under 26(a)(1) because it doesn't, (a)(1)(A)(i), along with the subjects of the information that the disclosing party may use to support its claims or defenses unless it would be solely used for impeachment?

MR. BENNETT: And it's the preceding clause as well. That is, it is the identification of witnesses the defendant intends to use in its defense or that a party intends to use.

And so the fact that someone has knowledge -- I mean, there are cases before you where we have 50 people identified. There's a big distinction between

this person may have some connection or knowledge and these are people that we intend to use.

THE COURT: What would you suggest that they -- if they were to say that it is impeachment, because, really, they are using Woodson in response to your Wood affidavit, is that impeachment or is it affirmative evidence?

MR. BENNETT: I think for summary judgment it's affirmative evidence. They're not saying he lied. There's no dispute of fact that's at issue with respect to those exchanges.

I will tell the Court, I mean our M.O., my firm's way of conducting its litigation practice is to serve repeated Rule 26(a) -- supplemental Rule 26(a)(1)s. And we're careful to that because we don't want to be the pot calling the kettle black. We certainly don't want to affect our practice and our ability to use evidence. That was not done here.

There have been a lot of back and forth between the parties, and I will tell you that Mr. Sears has been honorable in our dealings, and I cannot criticize this as an attempt by the defendant to connive or to trick or to be deliberately unfair.

I do represent to the Court that we bring this one forward because it's not simply a you didn't

follow the rules, but it actually legitimately did surprise us that Woodson was helping the defendant. We excluded Woodson as a threat to us when we interviewed her. That's a decision that we made. And we could have belted and suspendered it by not just simply relying on the lack of a Rule 26(a) disclosure, but we didn't, and we were entitled to not.

If it's just impeachment, if there are factors that are at issue, even on summary judgment, I don't think that I'd have a -- that's unfair argument. I would object to it. But I legitimately think it's unfair that the defendant did not so disclose during the discovery period of its intent to use this witness.

THE COURT: All right. Okay. I'll hear from the other side.

MR. SEARS: Thank you, Your Honor.

THE COURT: Uh-huh.

MR. SEARS: Your Honor, Rule 26(a)(1) requires the disclosure of each individual likely to have discoverable information that the disclosing party may use to support its claim or defenses. It's not a list of witnesses that are going to be called at trial. It's not list of witnesses that are going to be used in support of motion for summary judgment.

It's just witnesses disclosing to the other party to give them notice of people with discoverable information.

The rule, as recognized by the courts, is designed to prevent two things: Surprise and prejudice. Neither of those exist here.

First of all, Your Honor, in defendant Credit One Bank's Rule 26(a)(1) disclosures, we do include a catchall provision that says, "All individuals identified as potential witnesses by any other party in their initial disclosures or elsewhere in discovery."

Now, I have never seen any court say that a catchall provision doesn't work when the other parties are well aware of the individuals being identified, but that does -- that is in our initial disclosure that there may be other witnesses, and in other people's initial disclosures, or elsewhere in discovery that may be used.

THE COURT: That's not what it says. It says, "Identified as potential witnesses by any other party." So there are only two parties here. It's you and --

MR. SEARS: Well, at the time there were about four other defendants.

THE COURT: So you expect the plaintiffs to go back and look at all of those witnesses?

MR. SEARS: I --

THE COURT: You can abandon that argument.

MR. SEARS: Okay. I'll abandon that. It's not -- okay. So the plaintiffs do identify Sergeant Woodson in their supplemental disclosures. And one of the co-defendants, TransUnion, identifies Woodson in theirs.

Courts also say that with regard to the duty to supplement disclosures that -- and I cited the case law here, Your Honor, that Rule 26(e) requires supplementation unless the information has otherwise been made known to the parties during the discovery process or in writing.

The defendant, Credit One Bank's, response to the interrogatories identifies, as the Court indicated, Sergeant L. L. Woodson with regard to -- in response to a request.

THE COURT: So when was that, L. L. Woodson?

MR. SEARS: This was --

THE COURT: The initial disclosure date.

MR. SEARS: The initial disclosure?

THE COURT: I'm sorry. The response to plaintiffs' interrogatories. Tell me the dates you're

talking about.

MR. SEARS: March 28, 2016. The certificate of service says 2015, but that's not correct. It's March 28, 2016, just a month after the initial disclosures were made.

THE COURT: And that's your initial disclosure? I'm sorry. I interrupted you.

MR. SEARS: That's correct. That's our initial disclosure and also after their supplemental disclosure. February 22 is their supplemental disclosure.

THE COURT: Wait. Wait. Wait. Your initial disclosure you did not identify Woodson.

MR. SEARS: That's right. At the time she wasn't on our radar.

THE COURT: Okay. So you didn't. And then after March 28 what happened?

MR. SEARS: Well, plaintiff did. Co-defendant did. And then on March 28 in response to the discovery we identified her as someone with discoverable information. At that time I had not contacted her yet. I didn't know exactly what she was going to say, but it was someone that became of interest to me in the discovery process, and so I disclosed that to counsel.

Now, in addition to that, Your Honor, I did obtain two affidavits. One from Woodson and one from Schumacher. And I disclosed with affidavits to plaintiffs' counsel. In addition to that --

THE COURT: When?

MR. SEARS: That would have been probably in August, early August. It was in conjunction with Jim Lynn's deposition testimony. They had issued a subpoena wanting all documents that he looked at, and I had just sent this to him because I hadn't received these affidavits until maybe in August. I don't have the timeline in front of me.

THE COURT: You didn't receive them. Did they write them? Who wrote them?

MR. SEARS: No, I spoke to them. Based upon our conversation, I drafted an affidavit, sent it to them in Word so that they could make changes. I believe Sergeant Woodson made changes to hers. They executed it and then they sent it to me, but they didn't send it to me right off. Sergeant Woodson executed hers some time period before Ms. Schumacher's, and then I don't recall if they were sent together, but I know that I did not receive them immediately after they were executed.

THE COURT: But you had drafted them, so you

knew about them in advance.

MR. SEARS: Oh, yes. Yes.

THE COURT: Okay.

MR. SEARS: And in speaking with Suzie Rotkis during discovery, because, again, it says "otherwise made known during discovery," we discussed Sergeant Woodson. I told her that -- I said, "Have you seen the police report?" Because Mr. Wood testified that he asked for many, many times over a series of months for a copy of the police report, that they refused to give it to him. That was actually the first time I contacted or attempted to try to contact Woodson was after his deposition to find out why she's not providing him the police report. It was some time after that that I actually spoke to her the first time, and she says he never asked for it. I don't recall him ever asking for it. The records custodian doesn't remember it. If he would have asked for it, I would have given it to him.

I said, "Well, can I get a copy of it?" And it was one phone call and $5 and I received a copy of the police report that Mr. Wood testified that he couldn't get. And I asked her, I said -- well, I then spoke to Suzie Rotkis. I said, Have you seen the police report? Because the police report is not good

for them. The police report --

THE COURT: Wait. Did you say that to her or did you just ask her?

MR. SEARS: Who? Suzie Rotkis?

THE COURT: Ms. Rotkis.

MR. SEARS: Oh, yes. I said that to her. I said, This police report is not good for you guys. The police officer, Mr. Wood, filed the complaint. The police officer asked for him to provide supplemental information. He would not bring in the supplemental information that she needed. He did bring in some stuff. She took a look at an affidavit that was supposedly signed by Ms. Lawless, Mr. Wood's mother, and a title that she supposedly signed, and compared that with the signature of Mr. Wood, and determined that --

THE COURT: Right. I read the affidavit.

MR. SEARS: Right. So -- but then also she ultimately concluded that the only reason he was filing a complaint was to get out of paying credit card debt, and that it wasn't a bona fide claim. And I told Suzie this. And Suzie says, Well, that's --

THE COURT: We're really formal. So I'm going to ask you to call everybody by their last name, please.

MR. SEARS: I'm sorry.

THE COURT: I know you know her well. People make mistakes, though, about who they decide to call by first names. So I'm just going to say everybody by last names.

MR. SEARS: Okay. So I spoke to Ms. Rotkis, and she indicated, Well, that's not what she told us. We've talked to her at least on three different occasions.

THE COURT: So when is that conversation that you had with Ms. Rotkis?

MR. SEARS: It would have been towards the end of July, I'd say, because it was after Mr. Wood's deposition, but not immediately after, and certainly prior to the time that I obtained an affidavit from them.

So when I spoke to Ms. Woodson next, I said, "Have you talked to plaintiff's counsel?" And she goes, "I've never talked to them."

So I'm not sure what the status of that is. But certainly the fact that Sergeant Woodson had information that is not good for the plaintiffs' case is no surprise to the plaintiffs because he just told you that they considered her as a witness, and as a strategic move decided not to use her, and --

THE COURT: When did discovery close, again? I should have that right off the top of my head.

MR. SEARS: Again, that was I think towards the end of July, beginning of August. I've got the scheduling order here, Your Honor.

THE COURT: I'm sure it's in --

MR. SEARS: Although it does say "days before" instead of -- it was in the July-August time period.

THE COURT: Mr. Bennett, do you know?

MR. BENNETT: If you can give me a second, Your Honor. I don't want to hold the Court up. I'm trying to get you the exact date.

THE COURT: Well, while we're looking that up, and I'll ask him to do that just because you're the person I'm asking questions to now, and it's hard to do two things at once. As to these interrogatories, I don't have the final pages, I don't think.

MR. SEARS: I have a copy, Your Honor.

THE COURT: Can I see it, please?

MR. SEARS: May I approach?

THE COURT: No. Actually, our court security officer will do that.

MR. SEARS: It looks like the discovery

deadline would have been sometime in mid-August. It is 70 days prior to the trial date, and the trial date was October 6.

THE COURT: I want to be sure I'm understanding this process. So the response to the interrogatories, did your client sign them?

MR. SEARS: Yes, we have a verified --

THE COURT: It's not on what I have here?

MR. SEARS: My co-counsel gave that document to me, so I don't know if it includes the verification or not.

THE COURT: Is there any dispute as to whether or not they are verified? I haven't seen verifications.

MR. BENNETT: We're not disputing that, Your Honor.

THE COURT: Okay.

MR. BENNETT: We're not contending that as a basis to disqualify those.

THE COURT: I just want to know, though, whether it was verified. Did your client say this or did you?

MR. SEARS: My client would have reviewed that and verified it. It would be my practice. I would be very surprised if there's no verification.

THE COURT: So, Ms. Mahaffey, can you look that up?

MS. MAHAFFEY: Sure.

THE COURT: Just go ahead and do that quietly.

All right.

MR. SEARS: But, Your Honor, beyond the disclosure issue, both of these witnesses are impeachment witnesses. I mean, Mr. Wood's claims that he has a bona fide claim of identity theft, and that he filed a police report, and that he never sent the police report to Credit One Bank because --

THE COURT: So explain why it's not affirmative evidence if you're using it in summary judgment.

MR. SEARS: Oh, in summary judgment, no. It would be affirmative evidence in support of summary judgment on --

THE COURT: It would have to be disclosed under summary judgment and it wasn't.

MR. SEARS: When you say "disclosed under summary judgment" --

THE COURT: Because part of your basis for discovery in this discovery dispute is that you didn't have to disclose it because it was impeachment.

MR. SEARS: Right.

THE COURT: So under summary judgment, that exception would not apply.

MR. SEARS: The identity of the witness would have to be disclosed, not the affidavit. The parties can choose to do whatever discovery in whatever order and to whatever extent they want to do so. If a witness who's been disclosed is never deposed, that doesn't preclude them from being used as a witness at trial necessarily or on summary judgment so long as they've been disclosed, and they had the opportunity to take discovery of them. And certainly the affidavits themselves are not documents that I intend to rely on at the trial of this matter. It's the witness testimony, and both of whom have stated that they'll be here in person.

But I agree that with regard to the motion for summary judgment, it is affirmative evidence on the issue of whether or not it's a bona fide claim, and impeachment at the trial of this matter, if Mr. Wood testifies, that he attempted to get a copy of the police report on multiple occasions, but West Point Police Department refused to provide that to him, and certainly that would come in as impeachment.

THE COURT: Just give me one minute. I tried

to separate this out so it would be easy to look separate things up. All right. Do we know when discovery closed yet?

MR. BENNETT: July 26, 2016. It was enlarged by joint or subsequent motion, Docket No. 42, to permit the discovery of Mr. Lynn, the expert the defendant had disclosed. The plaintiff had timely submitted a subpoena and had not received a response.

In our meet and confer effort in that regard, the parties jointly moved that's 42, Document No. 42.

THE COURT: It was enlarged until when? Because Mr. Lynn wasn't deposed until August 25.

MR. BENNETT: Yes, Your Honor. I believe it was a 30-day enlargement.

MR. SEARS: Your Honor, also I don't know if that factors in, the extension of deadline.

THE COURT: You have to speak into the microphone because that's the only way my court reporter can hear.

MR. SEARS: There's also an agreement by Credit One to permit an extension of the deadline for plaintiffs to disclose a rebuttal expert. I'm not sure if that was factored into the ultimate discovery deadline.

MR. BENNETT: Your Honor, the Court's order

dated August 19, 2016, Docket 45, resolved that motion to enlarge, and the Court made very specific changes to the scheduling order. Dispositive motions were to be filed by August 31. *Daubert* motions by the same date. And then the Court set a hearing for today at that particular hearing, but the discovery generally wasn't enlarged.

THE COURT: Do you all have a copy of Dockets 42 or 43? Madam Clerk, can you get me a copy?

I think Ms. Charity can get it.

Ms. Mahaffey, have you found the information?

MS. MAHAFFEY: Your Honor, may I confer with Mr. Sears for a moment?

THE COURT: Certainly.

MR. SEARS: Your Honor, I was informed that she does not have a copy of the verification.

MS. MAHAFFEY: We believe you have the full copy there. We're not certain that --

MR. SEARS: The discovery responses would not have been filed with the Court.

THE COURT: Yes, discovery responses are not filed with the Court unless they become part of another motion.

MS. MAHAFFEY: I think they were -- that document was part of another motion.

MR. SEARS: Right. So I would not be able to tell you today based on the information I have with me.

THE COURT: Mr. Bennett, have you found it?

MR. BENNETT: I found what we have, which is filed in support of our summary judgment as Docket 60-2, which is just signed by counsel. We don't have a verification page. I don't have one. If I could correct. If we had a verification page, we would have attached it here, but that is not part of our chart that we submitted to Your Honor as our challenge. But I think that is the copy that we have.

THE COURT: And it doesn't have a verification. So I'm going to ask Ms. Cordner to go back and see. Do I have everything that we have?

MS. CORDNER: Yes, Your Honor. I can go check.

THE COURT: All right.

Pardon me. I'm reading the dockets.

All right. Okay. Is there anything else?

MR. SEARS: I don't have anything further, Your Honor.

THE COURT: All right.

MR. SEARS: Thank you.

THE COURT: Well, one issue is I want to be

sure that we have the affirmation statements. I don't doubt that you have them somewhere, but I need to eyeball them because, obviously, it's required under discovery rules. And I do find that making sure that you're following each rule as articulated by the federal rules is the best way to assure that things go forward in an appropriate manner.

So this is what I'm going to do: It does seem that there was some notification of the fact that Sergeant Woodson existed. I think the plaintiffs are being candid in saying that they did an informal discussion with Sergeant Woodson, and that they didn't either locate or ask for the police report, and that they were under -- they made a strategic decision not to go forward because Woodson did not seem sympathetic to their client, which is a strategic choice that can come back to bite you.

The defendants indicate that they identify in the interrogatories Woodson and a custodian. So I'm really speaking to both of these individuals, the custodian of records, which is also Schumacher.

In their initial disclosures, it is clear that there was information that was found afterward that certainly materially changed the nature of what it is those individuals offered as far as testimony.

And I do think that the plaintiffs easily could have sought the police report in the way that the defendant did, but I'm troubled by this characterization of an oral representation to Ms. Rotkis being somehow mitigative. Either you don't need to make the oral representation or you need to update your disclosures in some fashion, it seems to me, if that's part of the defense that is going on here.

It's also the case that I think counsel is being candid, defense counsel is being candid, in stating that he's not quite sure of the timing of all this, but certainly Mr. Wood's deposition was on July 14th, so that was near the end of when discovery was supposed to close, which was July 26th.

Let me look at this. Mr. Lynn's report is dated July 7th. We're going to address issues about Mr. Lynn in the future, but it seems that it's through documents supporting his report that the plaintiffs were notified of the police report and the contents.

Is this letter that I have from July 7th, is this Mr. Lynn's report?

MR. SEARS: Your Honor, it is. Let me just provide some clarification there. Mr. Lynn's report was prepared on that date. I then subsequently took Mr. Wood's deposition. Mr. Lynn did not have the

affidavits from Woodson or Schumacher because it was after Mr. Wood's deposition that I obtained those affidavits, and then I supplemented my -- what I was giving to him as discovery developed, I supplemented information to Mr. Lynn. And then we received the subpoena for all information that I had communicated to him, and that's when it was produced, the affidavits.

THE COURT: All right. So he didn't update his report.

MR. SEARS: He did not.

THE COURT: Where is the rest of his report? I mean, his list of cases where he's testified or the rest of 26(a)(2).

MR. SEARS: That was all produced to plaintiffs' counsel.

MR. BENNETT: I apologize, Judge. It's not attached.

THE COURT: All right. So it was produced.

MR. BENNETT: It was produced, yes, Your Honor.

MR. SEARS: There's a curriculum vitae and also a list of items that he relied upon.

THE COURT: All right. So the production date was July 7?

MR. SEARS: I believe it was produced the same day that he finalized it, Your Honor.

MR. BENNETT: Your Honor, there was a supplemental production as a result of the Court having entered a largely uncontested motion to compel enforcement of our subpoena. So in August is when we received the substantive response to our requests regarding Mr. Lynn materials.

THE COURT: All right. Well, my clerk has looked through everything you have given us, and we don't have any indication that your client has signed off on these. So I'm going to hold in abeyance any ruling with respect to this because you can't speak for your client through interrogatories. And whether or not the plaintiff raises that, I have to determine what's admissible and what I'm allowed to review. Most lawyers do that as a matter of course, so I'm not doubting that, but until I see it, I just can't make a ruling based on your defense as to these interrogatories.

I will say, generally speaking, in this court we have tight deadlines, and one of the ways that we manage these deadlines is, in some respects, what Mr. Bennett described, which is that you are overly cautious about disclosure because you want the other

side to be overly cautious with you. And so we demand hard work and fair play from everyone. And so it is not the case generally that as a matter of course one would not suggest that you are calling a witness for a particular purpose with respect to this kind of information.

I think that the defendants could have gotten it. So this is, I would say, a very close call. They knew about this witness, and they could have done the exact same thing you did. So I'm not saying it's staying in. I'm not saying it's going out. It probably makes sense in the end that maybe they just can depose Sergeant Woodson. And I'm not sure you really need to depose the custodian, although you could, and that could take you all about an hour and a half. It wouldn't be overly burdensome on anyone, and it would just clear up the nature of how this unfolded.

I say that in part because the joint motion that you all submitted to extend the deadlines is unusually specific. It does not talk about additional depositions. What it talks about is modifying the scheduling order for the designation of plaintiffs' rebuttal expert, which you were not agreeing to or disagreeing to. Actually, you were disagreeing to the

plaintiffs' rebuttal for the deposition of your expert. It was represented. It wasn't overly represented that you were disputing it, Mr. Sears, the filing for the *Daubert* motions and then the filing for the dispositive motions because there was going to be this expert potential working in.

Interestingly enough, Mr. Lynn's testimony was taken and not utilized in the dispositive motions, but it doesn't really say anything about the rest of discovery, and that's a point of confusion. While the plaintiffs could have said, can we depose this person, can we follow-up, I try to take into account common lawyers' experience, which is when you have a lot of deadlines pending, each of you is working just to meet the deadlines. I can tell that is what was going on here. I don't think there was any bad faith.

And so my inclination is to just allow the testimony in but subject to a brief deposition by plaintiffs so they can supplement whatever they seek to put in. And so that's really a nonruling.

I want to be sure we've crossed the T's and dotted the I's with respect to the affirmation. So I'm not going to finalize that ruling until I hear from you all that you had a client sign off on this stuff. In my mind, you have to get your client

engaged. It is so important that they understand the upshot of what's going on for everything about the case so that they are engaged in the trial, for the inconvenience that it takes them to understand what exactly are the nuances of a particular case, and, of course, ultimately, they are the ones who are going to be sanctioned, not the lawyers. Generally speaking.

So I'm holding my ruling as to Woodson and Schumacher in abeyance, and I'm sure you all can find that swiftly. You can find it in the next day or two.

Basically, what I want a statement from each side is that any interrogatories, any requests, any documents that your clients are supposed to have signed for purposes of discovery they have in fact signed. So that goes for the plaintiff and it goes for defense. I just really dislike those things coming up at trial. It's an unnecessary mess.

So you all can do that within 48 hours?

MR. BENNETT: Yes, Your Honor.

MR. SEARS: Just for clarification, if we find there hasn't been that affirmation, that T crossed, go ahead and get it done, right?

THE COURT: No.

MR. SEARS: No?

THE COURT: You have to tell me why it's all

valid.

MR. SEARS: Oh, okay. All right. Thank you, Your Honor.

THE COURT: Because your client has to verify it.

MR. SEARS: Understand.

THE COURT: All right.

All right. So that's Ms. Schumacher and Sergeant Woodson.

This next discovery issue is an attempt to exclude? What are you trying to do? All the documents that were not disclosed prior to July 13. I'll tell you, there are a few things I need to know about these documents. One is it doesn't seem they were objected to right away; two, I have no idea what the number of documents are; three, I need to understand the prejudice that resulted; and, four, I need to know why they were disclosed late in time, relatively speaking. So those are my main questions.

MR. BENNETT: Yes, Your Honor. With respect to what documents the defendant has sought to introduce to date, we would withdraw our -- plaintiffs would withdraw their request for relief as to those matters. In fact, as to all matters other than Woodson and Schumacher, which the Court has already

addressed.

The reason is I think that our team was being prophylactic in trying to address this in anticipation of what may come at trial, but I believe it would be better to wait until we get Rule 26(a)(3) disclosures, and if there are exhibits that the defendant has not produced that it intends to use at trial, then we would make that objection and make the argument at the appropriate time rather than broadly argue that everything that they gave us in August is improper.

THE COURT: How much was it?

MR. BENNETT: It was all documents related to Mr. Lynn and that he might have --

THE COURT: I mean, the volume. I'm just trying to get a sense of how much it was.

MR. BENNETT: OSHA level. So I'd say maybe a binder as thick as Your Honor has right there at the top of your pile.

THE COURT: All right.

MR. BENNETT: I can't give you a specific number. A lot of that was not new. Let me correct that. A lot of that were documents that --

THE COURT: They indicate that some of it was a Bates numbering error. And you're not disputing that.

MR. BENNETT: Correct.

THE COURT: All right. So you're essentially withdrawing this without prejudice.

MR. BENNETT: Yes, Your Honor.

THE COURT: So I can deem it moot, but you're still expressing willingness to object to individual documents that are raised, perhaps under this basis or other bases; is that fair?

MR. BENNETT: That is fair, Judge. We would narrow it to, if we get to the point where we're going to trial, 26(a)(3) disclosures in anticipation of the Court's decision at a final pretrial conference or otherwise as to particular documents the defendant might have used.

That is, the defendant produced documents in response to our discovery requests. That itself is not in violation of any rule. The question is: Can they use them under Rule 26? And that, I believe, the position we take here is unnecessarily premature.

THE COURT: I would agree with that. You're saying the same with this any witness not disclosed in mandatory disclosures. Those are all things you will object to once you know that witness exists. It's not a general objection, which you know how I feel about general objections.

MR. BENNETT: I know how you feel about general objections.

THE COURT: So you are withdrawing your general objection.

MR. BENNETT: I am. I am withdrawing that, and I will say that I personally reviewed that. So this is not me saying somebody else is responsible. Everything went through my email box, my Word screen, and I looked at everything that came out. So that any criticism, I'm the one here that would deserve it.

THE COURT: All right. Well, it wasn't really critical, just factual.

MR. BENNETT: Yes, Your Honor.

THE COURT: All right. So, Mr. Sears, you're not going to, as one judge here was famous for saying, grasp defeat from the hands of victory, are you, sir?

MR. SEARS: No, I won't.

THE COURT: All right. So that for the time being takes care of the discovery issues, correct? Most of them are withdrawn as moot. So that's all documents not disclosed prior to July 13, any witness not disclosed in the defendant's mandatory disclosures or supplemental mandatory disclosure, and the overarching objection to plaintiffs' -- the response to plaintiffs' request for production to defendant of

number 15 was withdrawn earlier as moot with plaintiffs' recognition that they requested that information on an untimely basis.

And I will say that in response, Mr. Sears, you indicated there were certain Bates numbers that appeared responsive, but I just want you all to know to the extent you're practicing in front of me in the future, it's not clear to me we had those documents. So if it is the case, maybe we did because we've had a lot of documents, but whenever you're saying we did produce them, show me the documents so I can be with you in your argument, and I can rule more quickly. It's obviously a nonissue now. That's really just for future information.

All right. So on to Mr. Lynn, is that what we agreed to do next? Do you all want to take a five-minute recess or are you ready to go straight into Mr. Lynn? We have a lot of time together today. We can do Mr. Lynn and then take a recess.

MR. BENNETT: Plaintiff is ready.

THE COURT: Pardon me?

MR. BENNETT: I'm ready.

THE COURT: Okay.

MS. MAHAFFEY: We're ready, Your Honor.

THE COURT: All right.

All right. So, obviously, Mr. Bennett, you're seeking to strike the testimony of Mr. Lynn.

MR. BENNETT: Your Honor, the sequence for knowing the basis for an expert's testimony is, under Rule 26(a)(2), the party propounding or proffering the expert has to provide an expert witness report that complies with Rule 26(a)(2) and includes, of course, the specific opinions, and the methodology, and analysis to reach those opinions, amongst other requirements. Then we have an opportunity to depose the witness and to request documents. And here we did that, both requesting documents from the defendant directly as well as through a third-party subpoena to Mr. Lynn.

And then, thirdly, we can depose the witness. Here we've done that. We took Mr. Lynn's deposition, and we recounted that testimony appropriately, I think, in the plaintiffs' motion and memorandum in support of that motion to strike Mr. Lynn.

Ordinarily, in accordance with this Court's preference, as well as ours, we do not include the complete deposition transcript of a witness. We did that here so that the Court would know that we were not parsing or excerpting a sentence here or there. It's not a pleasant read to have any deposition or

hearing in which I'm speaking a lot, but the deposition itself, I circled back again and again on a couple of important issues. The first was to try to understand what the witness's qualification was, and, in related importance, what the witness's opinions were.

If you look at the report, which Your Honor referenced moments ago, but which is filed with this court as 58, Document 58, Exhibit 1, the first exhibit in support of our motion, it's not exactly clear what the opinions are except at page 3 of 7 following the Pacer pagination, it says, "A summary of my findings, opinions, judgments and conclusions on the six ACDVs are as follows."

The Court by now knows that ACDV is the acronym for Automated Consumer Dispute Verification form. That's the way credit reporting agencies communicate a dispute that comes in from a consumer to the credit furnisher.

So you then have, at least by numbering, six separate numbers. Then, I guess, there would have been an opinion as to each one if this were following an ordinary expert witness report structure. Then it follows at page 5. You provided me a series of questions. Here's my answers with some bullet points.

So my deposition attempted to determine the basis, the methodology, and the credentials of the witness to so testify as to each of these. And I think that we proved in our memo that the witness was not qualified to render opinions about how a furnisher conducts a credit reporting dispute investigation, and that the witness did not provide methodology, and that the witness attempted to offer legal opinion, long legal opinion, but legal opinion nonetheless. Still the defendant didn't respond to that memo substantially. Its response consisted of --

THE COURT: I'm going to stop you there. So your challenge is the expert based on what?

MR. BENNETT: We're challenging the expert because -- well, we're challenging the report because it doesn't itself identify the opinions, methodology, and analysis to get to those opinions. Second, we're challenging Mr. Lynn's use at trial because he's not qualified to render the opinions that we at least discern from his report. That is, his opinions are basically that this credit furnisher conducted a reasonable investigation of the ACDV disputes.

There's absolutely no evidence, with no exaggeration, there's no evidence that this witness is qualified to testify as to that. In sub letters here,

(a), could it be industry standards? Would the witness be qualified to testify as to this is the industry standard? And the answer is no. We sought that evidence and he didn't so testify. (b) Is he mistakenly but nonetheless offered as a witness to say here's the legal standard? That the Fair Credit Reporting Act legal standard requires you to do this under *Johnson v. MBNA*. For example, the searching, meaningful inquiry to determine the truth. And the witness was not familiar with the case law that set those standards, the regulations of the Federal Trade Commission and CFPB or other bases to understand the law even if legal opinion were properly the subject of an expert opinion here.

And so -- and, of course, we are left with three, which is any other basis. And the only other basis that the defendant offered to have any knowledge as to what a credit furnisher investigation does is that he read the depositions of the defendant's witnesses in this case and then restated what they did and said, That's reasonable.

Now, we talked about, and I intend to do it again here, the cosmetic appearance of credentials that Mr. Lynn offered. And I asked him in his deposition, and we cite this repeatedly, "What are the

bases of your claim to be so qualified?"

And in the deposition, it came down, in my examination, to three bases. The first was that this witness had worked at a bank in the '90s and before the '90s. At page 4 of our brief, we start with the presentation of the deposition testimony, but his summary at the bottom of page 4 is at the deposition transcript 13, 7 through 16, and he says, "The preponderance of my professional experience has been as a lending officer with Merrill National Bank, as a training officer with Merrill National Bank." And I'll pause there because then the second, which I'll talk about in a moment, he says, "as a consultant to various financial institutions around the country, and -- and obviously from litigation."

So I could talk about those three credentials which he offered. First, he worked for a bank; second, he served as a consultant with various financial institutions around the country; and, third, obviously from litigation.

Now, for the first, his banking experience. In his deposition, which the whole exhibit is attached as Document 58-2, I asked him at page 16, when I say, "So I want to talk about the first category," which is that he worked for a bank. "You would agree that your

greatest source of information about the Fair Credit Reporting Act" --

THE COURT: Where are you?

MR. BENNETT: I'm sorry. Page 16, line 8.

THE COURT: All right.

MR. BENNETT: So I say, "Your greatest source of information about the Fair Credit Reporting Act came from your years working with or for Merrill," M-E-R-R-I-L-L, "National Bank; correct?"

Answer: "I would say that, but I'd also say working with other financial institutions as a consulting -- as a consultant."

And then I begin down at line 24 -- by the way, 23, "When did you leave Merrill National Bank?"

I left January of 1993.

By the way, Judge, 1681S-2 was enacted by Congress in '96 and went into effect in 1997. *Johnson v. MBNA* was the second case nationally, the first appellate case to interpret it, and that, I believe, was 2003.

So then I asked the next question, page 16, line 24, "What experience did you have at the point at handling credit-reporting disputes at Merrill National Bank?"

Page 17, line 1, answer: "I didn't work in

that area. I worked as -- again, as a lender end as part of being a lender -- and I was a commercial lender at Merrill National, small business lender."

And I'm skipping to the last sentence. He says in that paragraph, "So you were evaluating their personal credit standing as part of the overall underwriting process."

"But you didn't have any experience with the ACDV process while you were at Merrill National Bank?"

Answer: "That's correct."

"What about 1681S-2B? Did you have any experience with that while you were at Merrill National Bank?"

Answer: "No."

So the first category is Merrill National Bank. I'm sure if -- and by the way, at page 29, I'm sorry. At page 13, line 7, the witness explained what type of knowledge he had. And for that he said -- I believe it's 7. He says that he was a user of credit reports given the professional experience that he had. That is, and again, as a commercial lending officer, he had read credit reports in considering how they would be used in credit.

I might challenge the relevance of a late '80s expertise to decide what credit damage is

cognizable, but we don't have to because the witness isn't offered for that purpose. That is, the witness isn't offered to say Mr. Wood could have gotten a mortgage. I've looked at his credit, notwithstanding this issue, he could have obtained a mortgage. And I know that because I was a lending officer. That's if Mr. Lynn was going to say anything about being a user of credit reports, providing expertise, it would be in that category, and that's not where he's offered here. He's offered to provide ACDV expertise, something he explicitly and unquestionably says I have no expertise in.

The second category of expertise or of experience that he claimed got him some knowledge would be what he characterized as he's done consulting work before. Now, initially, I thought, well, that's intimidating. A CLE speaker typically knows the material that they're speaking about. And so we delved further into that, and if the Court will start at page 14 of the transcript. Actually, I'm sorry. I apologize, Judge. Start at page 47. I will drag the Court back to 14, but there's proof of my limited deposition skills.

So at page 47, line 14, "And what years did you serve as a consultant on commercial and retail

credit issues?" And he said, "I'd say from the early onset, probably 1996 through, oh, 2008."

I'm skipping to line 22. He says, "Some of those institutions would be included in the work I did through Omega -- Omega Performance Corporation that I described before."

And skipping to -- and I'm not skipping to exclude it but to save time, at page 48, line 11. And then "Some of the individual clients that I had I also did the Omega consumer lending program that I described before. That might have been four or five."

We've also cited other testimony about the consultant experience, and I'll point to it in a bit, but if I give the Court what we learned in the deposition, in 1996, Mr. Lynn had an opportunity to teach a survey course on using these materials that were provided him by the Omega Performance Corporation. He testified in his deposition that the actual course book was given to him. It included a chapter on Consumer Lending Laws, one of which was the Fair Credit Reporting Act, and that Mr. Lynn used the same materials from 1996 to when he stopped with Omega, and then used the same materials on his own for those four or five additional customers or clients. And he would do bank training for some of these

employees on a wide variety of issues, and one section was Consumer Lending Laws, and one section of that was Fair Credit Reporting Act, all from materials that were drafted and used by him and unchanged from 1996 forward. 1996, of course, the furnisher investigation duties didn't exist.

Now, the deposition, it is replete with our return to this question. The survey nature of it is at page 14 of the deposition. So prior to -- so between 1996 and 2000 Mr. Lynn said he worked on his own apparently. The dates weren't crystal clear to me as to when he did it on his own or with Omega. What's clear is that he used the same materials.

At line 11, he explains he was the facilitator of various credit-training programs. He taught, at line 13, a consumer-lending program or facilitated a consumer-lending program approximately 15 times at various institutions in the mid-Atlantic region as well as in the south.

Part of the consumer-lending program was an explanation of various consumer protection regulations that included the host of laws Your Honor is likely to see our firm litigate here, but well more than the Fair Credit Reporting Act. So that's lines 17 through 21, page 14.

And then if you look at line 24, page 14, I asked, "You can't say that you taught how to comply with the furnisher obligations of the Fair Credit Reporting Act, the safety" -- but that would have read the "1681S-2B provision in this case when you worked for Omega; right?"

Answer: "I can't say that for sure because I don't have the materials. I did search for them, but I don't have them any longer. I've done it -- I did it 10, 12 years ago."

And he says at line 10, "I can't be more specific than that, but there was a segment in that program that described and gave situational elements as to how the Fair Credit Reporting Act works and how it applied."

"And that is in the context of discussing sort of a survey course of all the different laws that might affect a financial services entity; right?"

And his answer at line 18, page 15, "Yeah. There were -- as I said, there were several of the major -- what I would consider the major federal statutes at the time which I've described before, and that was -- the Fair Credit Reporting Act was part of that description."

After we cleared, or at least what I thought

we had in our deposition, effectively gotten the witness to say I didn't have any business knowledge through Merrill. I didn't have any specific furnisher knowledge. I then said, "Well, let's talk about the third." And I'm sorry. One more thing on that second category of knowledge, Judge.

Page 51, line 12. And, again, we had subpoenaed all the documents that included these materials that the witness claimed would show he had taught stuff about the Fair Credit Reporting Act. So I went back again about these materials.

If you start, I'm sorry, at line 3, "So during what years were you doing," it says "the Experian program," but it would have been the "program on the Fair Credit Reporting Act -- that would have included something regarding the Fair Credit Reporting Act outside or prior to the Omega Performance?"

"That would probably be '96, in that neighborhood, until '99."

At line 12 I asked, "And you don't know what materials that would have regarded a furnisher's obligation of to conduct a dispute under 1681S-2B?"

Answer: "I didn't put materials together. When I did it with Omega Performance Corporation's materials, I didn't write the materials."

Question: "And so the expert knowledge that you contend you obtained through these two training programs was through your review of the Omega training materials?"

Answer: "That's correct."

Question: "And do you know whether those training materials existed in 1996?"

"I believe they did, yes. I want to say '96, '97, in that range, I started doing this. I can't remember specifically the year."

Question at page 52, "And did they change any -- any material ways with respect to the explanation of the furnisher's obligations under 1681S-2B?"

I had not revealed to the witness the knowledge that S-2B didn't exist at that time. And the answer was: "No. No. I think it was the same program that I used at all times. I mean, again, it was prepared by Omega Performance."

Now, the third category of knowledge or source of the witness's knowledge was that he had been an expert before and in this case. And this is a contention the parties have. You see it in the defendant's memorandum opposing our motion the argument that a witness can grow their knowledge. I

could hire someone to read the depositions in this case, and then they could opine as an expert from the new knowledge they obtained in this case. We disagree that that's valid under 702.

But at page 18, line 24, "Are you claiming that you have obtained your expert knowledge in significant part because you have reviewed documents and information in lawsuits where lawyers or clients hired you to serve as an expert?"

Answer: "That was a significant part, yes."

Question: "So other than when you were hired in litigation to be an expert" --

THE COURT: I'm sorry. What page was that?

MR. BENNETT: I'm sorry. 19.

THE COURT: 19. Sorry.

MR. BENNETT: Line 4. I'm sorry, Judge.

THE COURT: 24, right?

MR. BENNETT: Page 19.

THE COURT: Line 24?

MR. BENNETT: Line 4.

THE COURT: Sorry. My apologies.

MR. BENNETT: "So other than when you were hired in litigation to be an expert, the only other source of information that you have that educated you about the furnisher obligation in the Fair Credit

Reporting Act would have been when you" --

THE COURT: Okay. I have to stop you. I'm not finding that. What page?

MR. BENNETT: 19, line 4.

THE COURT: Sorry. I thought you said line 24. My apologies.

MR. BENNETT: Between the two of us, Judge, I suspect my communication would have been -- but if you look at line 4.

THE COURT: Ms. Daffron will get it right. So we're good.

MR. BENNETT: Of course she will.

THE COURT: I'll check and make sure it was not me.

MR. BENNETT: And so I asked him -- the question pretty plainly was, Besides your homegrown expert knowledge from being an expert, the only other furnisher obligation -- the only other knowledge you have about the furnisher obligations under the FCRA would have been when you were putting together the survey coursework for the Omega training you did maybe 15 times, right?

Witness: "Yes. Both of these sources were basically -- gave me the background and experience I have."

By the way, at this point I didn't know that the witness didn't put the courses together. He bought them. That was pages later. But that's it. So maybe 15 times the witness did a survey course. He's abandoned the Merrill National Bank that the defendant tries to resurrect in its opposition brief. By this point in the deposition everybody agrees that's not a basis for his furnisher FCA knowledge.

So the two bases for the knowledge in this deposition the witness says are, I taught a survey course with somebody else's materials created sometime in '96 or '97. I can't find them. I don't remember whether they said anything about a furnisher, and I taught maybe 15 times over that course, and it was a small subset of a survey course, and, number two, I've been an expert before.

Now, on that last category, we asked the witness repeatedly to give us knowledge -- the information about what cases. The witness identified -- you don't have it. I'm sorry. But there were a number of --

THE COURT: No, I've got it. It was filed. My clerk is ahead of you and me, and she brought it to me.

MR. BENNETT: But the -- so there was this

long list of cases the witness and I -- the first thing the Court will note is that no court has ever found the witness an expert in this field at all. I'm unaware of any field, but in this field the witness couldn't identify one instance. And in terms of being even hired by -- Mr. Sears had hired him a couple of times, but being hired in cases involving the Fair Credit Reporting Act, the witness was unclear as to which cases might have been Fair Credit Reporting Act derived.

The witness also did not offer any basis to explain how he become knowledgeable. That is, going back to what I said before, we're not entirely clear, the Court cannot be clear, as to what the opinion is as to why an investigation was reasonable and proper.

The witness could not and did not offer or proffer his testimony as being one of here are industry standards. So the witness did not say "I can testify about what the rest of the industry does." He doesn't explain that he's done a survey of industry or identify any particular companies for which he's been hired to examine their investigation procedures other than that we know he's been in two cases, I believe, with Mr. Sears.

I asked him -- if you look at the index that

we attached, which is at page 156, most of the time that I asked that the word "industry" is cited amongst those seven or eight were me trying to see if he would testify as to an industry standard. He doesn't. He doesn't proffer himself as having any knowledge of an industry standard.

And so then I asked him, Well, what do you think a reasonable investigation is? And this is within the brief, our brief, our memorandum's analysis of his attempt to offer legal opinion, but he would repeatedly just read the verbatim text of 1681S-2B. So I would say, What's the standard? And he would read, S-2B1A, B, C and D. That's it.

There is also cited in our brief at page 5 of our memorandum citing deposition testimony at page 29, line 21, where the witness himself says, "I'm not representing myself as an expert in the technical details of how information is communicated. I'm representing myself as an expert on the facts of the case on what happened, and what was supposed to happen, what should have happened, and so forth.

And in none of the testimony he offered in his deposition, nothing in the expert witness report does the witness provide a basis for him to testify about what was supposed to happen or what should have

happened.

All the witness does in his expert witness report is describe that he read what the employees whose depositions were taken testified to.

I will say, as well, the last way that a witness can seek to become an expert is the one, and the only one the defendant apparently seeks, which is to come here to a hearing after formal briefing, substantive briefing, citations to the deposition in their expert testimony, and the defendant's position is that it does not have to have provided in its opposition any details to counter or respond to our claims, our fact claims, of a lack of knowledge.

So anything that comes after here today, both in terms of argument by Mr. Sears or proffered new testimony by Mr. Lynn, is new to us and will be new to the Court because it wasn't in the opposition brief.

In the defendant's opposition brief, there are six pages of text. And the defense of Mr. Lynn really begins at page 3 of that, which is Document 66. And the response to our challenge to the lack of methodology was that we didn't ask questions by which Mr. Lynn could have explained himself, but Rule 26(a)(2) -- first of all, we did. You've seen the giant 200-page transcript. But Rule 26(a)(2) requires

the expert witness to provide that information. It's not simply a five-page or five-line identification of the conclusions of the report. Rule 26(a)(2) requires more than just that.

And regardless, in our brief, we say there's no methodology. Here's why. The defendant doesn't even attach a declaration from Mr. Lynn, which we would have objected to as contrary to his deposition. But there's no -- in the opposition brief, there's no argument to challenge the facts that we assert to say in fact we do have methodology.

Instead, the defendant says, At the hearing on this motion, Mr. Lynn will be available to testify as to the established industry standards upon which his opinions are based.

I asked him repeatedly about that. It should have been in his report. It should have been in an opposition brief, and it's unfair to proceed further and now attempt to redo essentially the deposition, to give a do over after Mr. Lynn has sat here and heard the argument. I'm certain he's read the brief seeking to have him found not qualified as an expert.

The only other -- well, at page 4 of the defense memo, the second paragraph, defendant says, Mr. Lynn's credentials indicate he's qualified to

offer expert opinions regarding many banking-related matters. He has worked in the financial services industry for more than 30 years and has training and experience in consumer and commercial lending, federal and statute consumer protection laws and regulations, and policies and procedures in the industry.

None of that was offered beyond what's in the report and then addressed by me in taking the deposition, which we've already recounted for the Court. He did not have any knowledge with respect to how furnishers handle credit disputes. He didn't have identity theft knowledge. His knowledge of identity theft, to put in the record something to address my own insecurity, was to refer to my congressional testimony and quoted that back. He had read that in preparation for my upcoming deposition of him.

And then he said, the defendant says rather, he has also taught courses on consumer lending issues, including the requirements of the FCRA, and I have now addressed that in the transcript itself.

I don't have anything more I can say, Judge, but I have done everything to shake these pockets to try to come up with what we might be faced with in terms of expertise in this particular case, and there isn't one to understand the basis for concluding that

the defendant's investigation was reasonable, and no methodology was provided at any point, not in the deposition, not in the memorandum in opposition, and not in the expert witness report.

THE COURT: All right.

MR. SEARS: Thank you, Your Honor.

Your Honor, referring to the July 7, 2016 report of Mr. Lynn, I would note for clarification that the numerated paragraph No. 5, which is on page 5 of 7 regarding the XB XH code, regards opinions that pertain to consumer lending.

THE COURT: Wait an minute. Your expert report does have a number on it.

MR. SEARS: I was referring to the Court's number at the top.

THE COURT: Thirty-nine, 5. What are you saying? Page 1 of 7, 2 of 7; is that what you're referring to?

MR. SEARS: I'm on 5 of 7.

THE COURT: Okay. I'm sorry. Let me just catch up with you. All right. I'm with you.

MR. SEARS: So one of the issues in this case is whether or not XB code or XH code was appropriate to use, and that has --

THE COURT: And that's, for the record,

that's capital X, capital H. Capital X, capital H. They are different codes.

MR. SEARS: That's correct. And that is a condition compliance code that is reported on a credit report that ultimately goes to the end user of that credit report. And that is creditors or potential lenders out there who are reviewing the credit report for lending purposes.

Similarly, on the next page --

THE COURT: Wait. So what are you clarifying?

MR. SEARS: Okay.

THE COURT: Are you supplementing his report?

MR. SEARS: No, I'm not.

THE COURT: Okay.

MR. SEARS: What I'm doing is I'm trying to define the subject matters of expertise that are at issue in this case.

THE COURT: Well, he's supposed to do that.

MR. SEARS: I'm sorry?

THE COURT: His report is supposed to do that. So where is it in the report?

MR. SEARS: Okay. For the purpose of identifying his qualifications, my argument to the Court is that there is an analysis of his

qualifications in two different areas. Okay? I want to define the subject matters of expertise that are called upon in this. And that is one that deals with ACDV investigations and one that relies upon experience when it comes to consumer lending. And what I'm suggesting to the Court is that the opinions that are expressed in the report of Mr. Lynn, I am trying to clarify which one of those from a qualification standpoint when it would implicate which subject matter, whether consumer lending or an ACDV experience.

THE COURT: So what is he being offered as an expert in? FCRA? Financial information? Are you saying that he's being offered as an expert in ACDV investigations and consumer lending?

MR. SEARS: Yes. To the end. That he's being offered as an expert with regard to ACDV investigations and also with regard to consumer lending.

THE COURT: This is under consumer stuff generally or with FCRA?

MR. SEARS: No, consumer lending generally.

THE COURT: I mean, ACDV also.

MR. SEARS: ACDV is separate from the consumer lending. The ACDV investigation has to do

with the dispute that's filed under the Fair Credit Reporting Act.

THE COURT: Right, but there's not any ACDV disputes under FCRA, right? Are there other -- can it be --

MR. SEARS: Oh, I see what you're saying. He has experience in cases that have been disclosed to plaintiffs' counsel including all the materials that he produced and reports in those specific cases with FCRA generally and has had a couple cases dealing with the investigation component. So he does have --

THE COURT: So that's my question. Is he offering expert testimony in ACDV investigation in FCRA cases?

MR. SEARS: That's correct. And in addition will be -- has offered opinions that pertain to the area of consumer lending with regard to how those reports are ultimately used.

THE COURT: Okay.

MR. SEARS: Okay. And, Your Honor, Mr. Lynn conceded at his deposition and I concede now. His experience and his work through his professional life is more balanced on the side of the lending issues, the consumer and commercial, than it is under the ACDV investigation issues under the Fair Credit Reporting

Act.

And the standard with regard to determining whether Mr. Lynn will have the ability to assist a finder of fact is whether or not he has any -- and these are ors - they are disjunctive - the knowledge, skill, experience, training or education. And it is sufficient specialized knowledge --

THE COURT: What are you quoting?

MR. SEARS: -- to assist -- well, I got that list from Rule 702 with regard to --

THE COURT: Just making sure I'm following you.

MR. SEARS: Okay. All right. It's whether or not he has sufficient specialized knowledge to assist the trier of fact in understanding something. And he can -- an expert can pull from any of those. And there's no perfect recipe as to what combination you would have to have.

And then once the testimony is admitted, then it's up to the trier of fact to assess the credibility and determine whether or not they will believe that --

THE COURT: You're stepping ahead, obviously, because it has to be admissible.

MR. SEARS: That's right.

THE COURT: So we're at whether it is

admissible.

MR. SEARS: Right. We're at the gatekeeper function.

THE COURT: Correct.

MR. SEARS: But I say that it's up to the trier of fact because much of what you've heard today as far as Mr. Bennett's argument I believe mostly goes to cross-examination issues, not as to qualification.

Under the Rule 702 standard, and we cited the case law in our brief, Your Honor, and this I speak more to in this regard to Mr. Lynn's qualifications on the ACDV investigation opinions as opposed to the consumer lending because the consumer lending I think even plaintiffs' counsel indicated he has extensive experience in that, but the case law indicates that a lack of personal experience should not ordinarily disqualify an expert so long as they're qualified on some other factor, on the knowledge, or the skill, or the training.

The federal courts say that an expert witness is not strictly confined to his area of practice but may testify concerning related applications, and that if he has educational and experiential qualifications in a journal or field related to the subject matter of the issue in question, it's admissible.

And that is in our response to the motion what we return to. And that is that base level that is required to establish qualification to provide an expert testimony.

Mr. Bennett discusses this course that was taught by Mr. Lynn. He describes it -- Mr. Bennett describes it as a survey course. Those are Mr. Bennett's words, not Mr. Lynn's. But the point of the deposition that he took was not really to discover anything other than what he could do to try to exclude Mr. Lynn because Mr. Lynn is the only expert in this case. The plaintiffs had disclosed an expert, but he refused to accept engagement in the case.

And when it comes down to looking at the experience or the background that Mr. Lynn has, I would argue that it is sufficient to assist the trier of fact to give him that specialized knowledge to be able to testify as to the matters that he's testifying to.

His work experience, obviously he worked most of his time in consumer lending. So obviously that assists him in providing testimony with regard to the lending issues, and that is what should have been reported or how it was reported accurately, completely, or whether or not it was misleading to an

end user of the credit report.

The consulting issue is an issue that Mr. Bennett primarily focused on with regard to the Omega course, but the Omega course Mr. Lynn explained in his deposition is a large corporation that goes around teaching and training businesses with regard to what their obligations are.

THE COURT: Okay. So let me ask you this: Rule 26 -- I'm sorry to interrupt you, but I have read through your briefs, and I'm aware that I let Mr. Bennett go for an extensive time. So I will let you follow-up on this, but here's my concern about this expertise.

It's certainly not the case that Mr. Lynn is not an expert in something. I mean, that goes without saying based on the level of experience that he has. But Rule 702 and *Daubert* and 26(a)(2) really require that you can't just offer somebody up as an expert in something. Right? The whole point is to hone in the discussion. So as a gatekeeper, a judge can decide is it really sufficient to aid the jury.

So what that means is it's got to be narrow to some degree, and there has to be a basis for the opinion that a jury couldn't utilize equally. So clearly that's part of what Mr. Bennett is challenging

which is that you can't just read the depositions because, of course, the jury can read the depositions and they can decide what they want to decide about it. And they have access to the laws as written, and they have access to the coding that your client used about XB and XH. And do they really need somebody to help them with that if that's one of your examples?

But the important thing is he does have to talk about methodology, and he has to say in the opinion, in the written opinion, the basis for it. So our jurisdiction is very specific that you're essentially stuck with the report you file because otherwise it is unfair. That's true for them, right? They're stuck with not having an expert at all because they didn't file anything. So they get nothing. They can't do opinion testimony at all.

So as I read through, first of all, it's not clear to me how you designated in his report what he's being offered as an expert in. So, ultimately, I'm going to ask you to point those two things out for me, and I know you started to, but I will say it's often a little more clear. So I'll warn you that that's a concern for me.

For instance, if you look at what is marked as page 5 of 7, which is where you were before, and I

think I'm exactly where you were before, it's paragraph No. 5, and it has within it three subsets. Excuse me, subparagraphs.

So it talks about Count Eight as a complaint, and it talks about these codings of XB and XH. It says what code XB indicates, and that is, I'm quoting, "An active dispute that is being investigated by a data furnisher," or Credit One Bank in this case. And it says, "The code XH denotes that the investigation has been completed and that the information reported by Credit One Bank has been verified as accurate."

So then he says, Both the Consumer Data Industry Association Credit Reporting Resource Guide as well as the Credit One Bank Customer Service Procedural Manual indicate that XH is a proper and appropriate compliance condition code for the subject credit card account given the circumstances as discussed throughout this report.

So where are they on notice as to his methodology? So presuming he can say that much. Presuming he can get to that issue that it's maybe not a legal conclusion, where is the other side on notice as to the basis of that decision and the methodology of getting there?

MR. SEARS: You know, that's difficult for me

to answer, and the reason why is because I believe the Court or Mr. Bennett, more specifically, would like to see a methodology the type of which comes to my mind as formulaic because *Daubert* had to do a lot with scientific evidence, scientific opinions. And when it comes to opinions such as this, the methodology is really nothing more than looking at what the industry standard is.

THE COURT: So where's the industry standard?

MR. SEARS: He cites it right there, the Consumer Data Industry Credit Reporting Resource Guide. That establishes an industry standard with regard to what condition compliance code. And the --

THE COURT: But does he --

MR. SEARS: What he does is he takes that standard and tests what Credit One is doing to render a conclusion as to whether or not it's consistent or not. So in my mind it's difficult for me to answer a question of where's the methodology when to me, and maybe --

THE COURT: This is the issue. The other side and the non-expert, which is me, has to be on notice. I read that, and I thought, What the heck is the Consumer Data Industry Association Credit Reporting Resource Guide? Where is it? Why does he

think that's the one to go to and not one touted by the plaintiffs' bar? Or if there's another industry guide. So, for instance, there's case law in med mal cases about what an appropriate standard of care is. So I think you're saying it can't be the same. But if he's relying on something, he has to say why, in my mind, it's something to rely on.

When I read a reporter's report of an event, I read some reporter's differently than I read other reporters, and that informs my response to what it is that they say happened. So there's a big difference in an oral reporting of Bill O'Reilly and Rachel Maddow, right? If they're talking about very same event, you might hear it differently depending on who's saying it.

So I don't see anywhere in this report where he says this is the methodology and it's the industry standard. And the problem is, under Rule 26, he has to tell not just plaintiffs' side, so they're saying I didn't get a chance to investigate it, and maybe he said it in here, and I'll give you the opportunity to tell me where he said that that's what he should have relied on, and anybody in the industry would have relied on, but he didn't tell me. And you have a lot of opportunity, you can make whatever report you want,

but you have to make the report. It doesn't change after this. Mr. Bennett is correct about that.

So why don't you tell me where in his report or in his deposition testimony I can discern what you just said, that that's the industry standard, that that's the basis, the methodology.

MR. SEARS: Well, that that's the basis of methodology of going to the industry standard? I don't know that -- I'd have to go back and look. I don't know that he was asked about the XB or XH specifically in the deposition. Maybe he was. I'll have to look at the transcript.

THE COURT: It's in the little thing.

MR. SEARS: Right.

THE COURT: Yes, he's asked a lot. On 37, 38, 39, 40.

MR. BENNETT: Judge, page 40, line 17, is where the question begins, and you look thereafter, "Where did you learn about the XB code?"

MR. SEARS: While I'm looking, there's actually case law. I'm not sure if it's from the Fourth Circuit or not, but I ran across it while I was doing research. And there's a claim made that because a data furnisher did not follow these guides, that it was negligence because they didn't have a policy that

was consistent with the guides. And the Court kicked that saying -- but I understand what the Court is saying that --

THE COURT: Well, I'm sorry to interrupt you, but I'm just going to read a little bit of this, and you can look in his deposition, too, because we're all here together, obviously.

MR. SEARS: Okay.

THE COURT: So on page 41, he says, In reading the manuals that were here and reading Credit One first, as well as the CDIA, which is the Credit Data Industry Association information, that's also at my disposal, and he was asked, "What CDIA information did you read?"

MR. SEARS: That's correct. And that was referring to documents that were produced in response to the subpoena.

MR. BENNETT: Respectfully, counsel, those were documents that the defendant produced. The defendant produced the CDIA manual. It was a Bates-numbered early production by the defendant to which the witness was referring. That is. It was the CDIA manual the defendant produced. It was not a Mr. Lynn-generated document. He was referring to -- he had looked at the documents the defendant gave him,

and that's the CDIA manual that is referenced here.

MR. SEARS: That is correct.

THE COURT: So he says he reviewed it. And where does it identify it as the industry standard? Okay. So this is what -- well, I'll allow you to file -- we'll be around. Unfortunately, I have a criminal matter that is going to be a little complicated at two o'clock. So we should finish up on this and take a little break.

I'll need to hear from you where he talks about his basis and his methodology.

MR. SEARS: Well, I would say that's it, Your Honor. I understand that perhaps the report may not put the Court on notice that this is the standard that he is relying upon. I understand that you may have a different background than what Mr. Bennett has in this area of the law. I don't think that there's, in my mind and in the spirit of this case, in disclosing Mr. Lynn's opinions that there would have been any doubt with regard to Mr. Bennett as to whether or not the Consumer Data Industry Association Credit Reporting Resource Guide, which has "industry" in its name represents the industry standard.

THE COURT: This is the issue, though. It is for purposes of this deposition, which is if he says,

and that's not supposed to happen in front of a jury. So Mr. Bennett is supposed to have an opportunity or you with the reverse is supposed to have an opportunity to challenge whether or not it's the industry standard.

So what happens in medical cases isn't whether or not there's necessarily a standard of care, but what does happen is a little bit of whether or not a doctor is familiar with that particular standard of care, if the pedestrian can speak about a particular lung damage in an 8-year-old or whether you need a lung specialist to do it.

So even in scientific cases, there are bases to challenge, and I'm putting that in quotes, air quotes, there are bases to challenge an expert's opinion because of how they support the opinion they offer, but you have to know what they are relying on. And I guess I'm going to turn back because what are -- Rule 26 -- I have new glasses and I have to move them. Rule 26(a)(2) says you have to have a complete statement of all opinions the witness will express, and the basis, and the reasons for them.

So you have to be able to show that he has what he's offering an opinion in, what specifically opinion is based upon, what level of expertise or type

of expertise. So that would be a pedestrian versus a lung expert. Can a regular lung expert talk about damage to a little kid or do you need a pedestrian who's going to know how lungs in little kids operate? And parties are going to fight about that, right?

So it matters what his background is. And you are saying his subject matter is ACDV investigation in FCRA cases and consumer lending, how these reports are used. Right?

MR. SEARS: Yes.

THE COURT: So what are the opinions that he offers and how does a reader know or the jury know what he can be bound to as opinions regarding the ACDV investigation in FCRA cases? So what are the opinions he offers in the report?

MR. SEARS: You're asking me to point that out for you?

THE COURT: Yes.

MR. SEARS: That's, again, going to 5 of 7, enumerated No. 5. That is the consumer lending area.

THE COURT: Number 5 is consumer lending?

MR. SEARS: Right, the XB versus XH because it's a condition compliance code that has meaning to the end users of the credit reports, and those end users are the potential lenders or creditors who are

reviewing this. And Mr. Wood's argument is that it should have been an XB because that would have had a negligible impact on his credit score. And credit score, obviously, is something that's taken into consideration when credit worthiness is reviewed.

THE COURT: Can you slow down your explanation a little bit?

MR. SEARS: Sure. The next page?

THE COURT: No, page 5. So you say that's consumer lending expertise because why?

MR. SEARS: Because it is a compliance condition code which conveys to the end user the status of the account. And that is whether or not it is in dispute or what stage of dispute it is in because they both indicate dispute.

THE COURT: Okay.

MR. SEARS: Again, it goes to -- if I can just lump the consumer lending together, the next page, the last two bullets, are consumer lending issues because it goes to whether or not the information is complete and accurate or potentially misleading.

And, again, that goes to the end user of the report, which ultimately results in the damages that Mr. Wood would try to claim in this case, and that is

denial of credit, inability to get credit, change the terms.

THE COURT: So you're saying the last two bullet points?

MR. SEARS: Yeah, those are consumer lending areas as well for which Mr. Lynn is uniquely qualified.

The first four bullets on that page deal with investigation procedures for which Mr. Lynn has some experience in.

THE COURT: Okay. So the first four bullet points are also opinions?

MR. SEARS: That's correct.

THE COURT: And that's under the ACDV?

MR. SEARS: Yes.

MR. BENNETT: I apologize, Your Honor.

Mr. Sears, you're saying the first four bullet points at page 6 you're contending are FCRA expertise or consumer lending expertise?

THE COURT: He said investigative procedures ACDV.

MR. SEARS: Uh-huh.

THE COURT: Right?

MR. SEARS: That's correct.

THE COURT: So you're not offering him as a

damages expert. So the last bullet on 7 of 7 can't be offered; right?

MR. SEARS: Well, he has no opinion as to damages because at the time there was no evidence of damages.

THE COURT: Well, he expressed an opinion that there's no evidence of damage.

MR. SEARS: Right. Or economic damages. Obviously, he's not going to testify with regard to emotional distress.

THE COURT: So you are not offering the third paragraph of number 4 on 5 of page 5 of 7, which says, "Based on its verification via Accurint, the bank was able to verify that the information being reported to the CRAs was accurate and complete. In my opinion, the bank's verifications were reasonably appropriate and consistent with the standard of care in the consumer data furnishing industry that data furnishers use credible external sources of information as necessary and appropriate in order to enhance the completeness of consumer credit investigations"?

MR. SEARS: We would be offering that opinion, Your Honor. I did not include that in my review of separating here, but, yeah, that is certainly an opinion we would want to present to the

jury.

THE COURT: And what expertise does that flow from?

MR. SEARS: It doesn't say. I could tell you what my understanding of it is, but it doesn't specifically say with regard to No. 4, but he has prefaced the report with his experience that I would point back to to say that that is what gives him the basis to say that.

THE COURT: Which part of his experience?

MR. SEARS: That would certainly go to his experience with regard to conducting investigations, which began -- well, generally, with his understanding of the FCRA before the section was added to here, continuing through the educational course that he taught based upon materials that were developed by an organization that taught the standard of the industry to folks in the industry, and continuing through --

THE COURT: What are you reading from? Where is that?

MR. SEARS: I'm explaining. I'm not reading. I'm referring back to -- well, this is probably -- actually goes to his addendum report or not -- the appendix that has the C.V. on it, which is not included in plaintiffs' motion.

THE COURT: I have the C.V.

MR. SEARS: You do have it?

THE COURT: Yeah, I have what you filed.

MR. SEARS: So that goes through there with regard to the courses that he has done. And also, Your Honor, there is a disagreement, I guess, between Mr. Bennett and I as to whether or not litigation experience feeds into the experience and knowledge that you have. I mean, if you conduct a survey as a result of work in a particular case, then that has come within your body of knowledge, and to the extent that Mr. Lynn, in addition to teaching the classes, has had an opportunity to see how other banks have responded to ACDV disputes in conducting investigations, then he could certainly base his opinion on his own experience.

THE COURT: Well, so this is the issue. I'm just going to say this to you. We probably should take a break. So it's one o'clock. I'm going to give you an opportunity to sort of put your head together about this because Rule 26 is very specific. You can probably tell that one of my issues is, one, the opinions he's expressing have to be clear, and the basis for the opinions has to be clear. Not just for purposes of the deposition, but so that the report

essentially can't involve its own sort of surprise, which is part of what Mr. Bennett is talking about.

So if you have expertise in litigation, what you then need to do is say, you know, I had three cases that involved FCRA, and they were ACDV cases, and the issue was the reasonableness of the investigation. And so I was able to review what they did. And in that instance, they didn't look at Accurint at all. They did something else. So based on my knowledge and my experience and this specific part of the consumer data industry, blah, blah, CDIA, what they did is reasonable because it's exactly what the CDIA requires in this section, and plus we looked at Accurint. Because then you have a sense of the methodology and the basis for the opinion.

So I read through Mr. Lynn's report or his deposition, and I do think that he was completely honest. And you don't want any witness to be anything but that, and I wouldn't expect him to be anything -- this is a financial services executive. But if he's offering expertise in ACDV investigation in FCRA cases, I'm struggling with his honest statements that suggest a lack of knowledge about the ACDV process.

In his testimony, I think that on page 28 he suggested or testified that he didn't know about

Experian's dispute process. He indicated he doesn't claim that he has a wealth of knowledge in furnisher credit reporting disputes under FCRA, which, frankly, Mr. Sears, you're not overstating that either. And I appreciate that.

He indicates, I'm representing myself as an expert on the facts of the case and what was supposed to happen and what should have happened. He said he is generally speaking, an expert on credit scoring, from his experience as a lender. He indicates, I think on page 35, that he had never heard of Accurint before this case. He testified that he didn't know where Accurint got its address data.

He suggests he might have first learned about the XB code in this case. He indicated that these furnisher requirements, 1681S-2B, he thought was enacted in the late '60s or early '70s, and he did testify -- which, of course, is not correct. That particular part was enacted later, in '96. He indicated that he was teaching from this course material and that it didn't change.

And so one of the difficulties about that -- frankly, I think his memory -- as I read it, his memory wasn't clear. He wasn't trying to overstate what he did know or didn't know, and he didn't have

the materials.

MR. SEARS: If I can put things in context -- that's fine.

THE COURT: So he said that no court had ever found that he was qualified to give an expert opinion, and I can't remember -- I know it's on page 64, and I can't remember if he just never needed to offer the expert opinion or if he was actually found not to be expert. He said -- now, this is a part I find troubling. I think he said on page 74 that he believes the consumer is the person who puts the information in the all relevant information field of the ACDV. And that's a big problem because that's a big issue in these cases.

He said he didn't know how a consumer creates the ACDV. He didn't know how a furnisher would open and access an ACDV. So all of those don't just suggest general knowledge. They suggest important absence of knowledge on pivotal issues in the case.

And so being able to separate that out from then being able to offer a consumer lending expertise on XB codes and XH codes without saying why, independent of your FCRA expertise or the ACDV expertise, is a problem about how the report exists as it is. Because, you know, we just don't fly by the

seat of our pants in federal court. As you know, we require things in writing, and we have to follow the rules. And the reason is you want to be sure that what Mr. Lynn can offer or anybody can offer is a good use, a reliable, admissible use of information that can aid the jury in its decision.

MR. SEARS: Right.

THE COURT: So I am telegraphing to you I am struggling with not Mr. Lynn personally. And, Mr. Lynn, this has got to be so frustrating, and I want you to know I'm sorry about that. But it certainly is not personal. It is what I have to review for purposes of the jury genuinely being aided under the facts and the law of this particular case.

And I know how expert reports get created. I know deadlines are hard. I know information flies back and forth. And so that happens with every single lawyer, every single expert. But I do the same thing with, you know, the pediatrician who wants to testify about a lung disease when they really don't know anything about lungs and they know everything about kids.

So I am telegraphing that to you. I am going to give you an opportunity to review anything else you want me to consider, but I think we should take a

brief recess and then think about where we go next.

Now, I have a 2:00 hearing, and I'm telling you that's going to be an uncomfortable one. We could take a 10-minute recess and start on the next bit. I'm happy to take over again. I want to hear from you, either of you. I think Mr. Bennett is objecting to Mr. Lynn testifying right now. Do you have a position on that? I'm talking to Mr. Sears.

MR. SEARS: My understanding is that he believes that we did not provide substantive response to the arguments that he raised, and therefore I've waived addressing any new evidence. My response to that is that we did provide a substantive response, but I'm not going line for line in the deposition because the deposition is what it is. What I'm doing is I'm going back to the basic, which is the experience that he does have. That this is fodder for cross-examination, not for matter of exclusion, and it doesn't take pages and pages to state that in response.

So my point is that we have done that. The Court had given Mr. Lynn the opportunity to appear. If the Court would like to hear something, we're more than happy to put him on and provide further insight into this. But other than that, I do not agree that I

have waived any right to bring Mr. Lynn. If the Court could like to seek clarification on any issue, but I'm also not going to insist upon it if the Court believes that it can rule based upon the arguments that we have now.

THE COURT: Well, this is what I'm going to do. We're going to take a recess because I'm certain that I have been very ungracious to our court reporter, if nothing else. And we're going to just take a 10-minute recess.

If Mr. Lynn -- if you all agree that he's going to testify, one issue is we do have him in the room now. And so, Mr. Bennett, your objection is on the record. I'll let you put on evidence. I want it to be short shrift evidence, though. It can't be any more than 10 or 15 minutes. And it can be honed into what we are saying today with the caveat that Mr. Bennett says that's completely unfair.

And I'm going to be honest with you, I'm not unsympathetic to that argument. But I believe in creating a full record, and it's really up to you and to Mr. Bennett about how we want to go.

It's now one o'clock. Am I right about that? So we can take a recess to 1:15, and we can hear evidence until quarter of two. Then we're going to

take a longer recess for this other case, and then I want to finish up later today. I wish I could do otherwise. And I tried to schedule it. It's a criminal matter. It has Speedy Trial issues, and nobody was available except for today at two, and I had to put it in because we have an early November trial date.

Does anybody object to that?

MR. SEARS: No objection, Your Honor.

MR. BENNETT: Of course, I don't object. Counsel may want this; the Court may want this; I know the court reporter does not want this, but not because I think it's insignificant, but because I think it's well briefed that the plaintiff would be willing to submit the summary judgment to the Court on papers or, of course, argue. I'm here for the duration.

THE COURT: Okay. Well, why don't we take a 10-minute recess regardless. All right? Because I need a break. So we'll take a recess until 1:15, and we'll just be aware that whatever we do next, you all talk among yourselves, as they say, and decide how we're going to use the next really only half hour that we have. I'm not requiring that you put on Mr. Lynn certainly. That's up to you all. All right?

MR. SEARS: Okay.

THE COURT: Good lawyers litigate their own cases. So we'll take a recess until 1:15.

(Recess taken.)

THE COURT: All right. So we have the pending issue about the expert disclosure. I'm really leaving it up to you all whether we need any testimony. I'm certainly not requiring it.

MR. SEARS: Your Honor, we would like to just have some short testimony on a very limited issue.

THE COURT: All right.

Your objection is noted, Mr. Bennett, just so you know.

MR. BENNETT: Thank you, Judge.

THE COURT: Come on up, Mr. Lynn.

JAMES F. LYNN, called by the Defendant, first being duly sworn, testified as follows:

MR. SEARS: May I proceed, Your Honor?

THE COURT: Yes, please.

MR. SEARS: Thank you.

DIRECT EXAMINATION:

BY MR. SEARS:

Q Would you please state your name for the record?

A First name James, middle initial F., last name

Lynn, L-Y-N-N.

Q Mr. Lynn, you have been designated as an expert in this case on behalf of Credit One Bank; is that correct?

A Yes, I have.

Q Mr. Lynn, have you prepared a report in this case?

A Yes, I did.

Q I don't have a witness copy to provide to you. If you'd like to see one, I could provide that to you, but was that on or about July 7th of 2016?

A Yes.

Q Mr. Lynn, you've been here today during this hearing and have heard the arguments of counsel and the discussion with the Court, have you not?

A Yes.

Q You understand that with regard to your report there are opinions related to FCRA investigations and then opinions related to consumer lending; is that correct?

A That's correct.

Q All right. Mr. Lynn, I'm not going to ask you any questions today regarding the FCRA experience that you have. I believe that has been fully developed and analyzed on the record, but I am going to ask you about your qualifications to provide an opinion on

issues relating to consumer lending. Okay?
A All right.
Q One of the opinions that you offer in this case has to do with the XB versus XH --
THE COURT: Why don't you -- all right. Go ahead.
Q -- XH issues raised by the plaintiff. Is that an issue that invokes the subject matter of consumer lending?
A Yes.
Q And the opinion in your report also has two paragraphs dealing with an investigation that produces incomplete, inaccurate or potentially misleading information on a credit report. Does that have to do with consumer lending as well?
A Yes.
Q So let me ask you, first of all, can you please explain how these issues or these opinions relate to consumer lending?
A As a user of consumer credit reports, a lender using consumer credit reports, whether it is a commercial lender or a consumer lender you are evaluating the credit worthiness of your prospective borrower or your existing borrower and analyzing their credit report. A personal credit report is integral

to that process. And what is on that credit report, obviously, you like to see very little derogatory information and more favorable or acceptable information. But if it is derogatory, you're trying to evaluate the significance of it, how it impacts your decision as to whether to proceed with a loan or restructure an existing loan or whatever. So that's basically how it's significant and important.

Q And how does XB versus XH designation for the condition compliance code factor into that?

A XH means it's a matter that was in dispute. It's now a closed matter. It's concluded so it has more definition to it. XB is a matter that is an open issue, and so you're looking at it and saying, well, which way -- it depends on the significance of the amount that's outstanding.

If it's an account that has a 100-dollar balance, that's one thing. If it's your mortgage balance and your mortgage loan, that's another thing. So to an extent, it's a matter of perspective as to its importance.

Q Mr. Lynn, what specialized knowledge do you possess with regard to the consumer-lending aspects of the opinions that you've offered with regard to accurate information, misleading information, or

designation of an XB or XH as a condition compliance code?

A I didn't quite hear.

Q My question is: With regard to your opinions that pertain to consumer lending, what specialized knowledge do you possess in that subject area of consumer lending?

A As testified before, as has been discussed this morning, I've taught a consumer lending program about 15 times. And, frankly, a lot of that teaching was prior to the time I became an expert. And what I didn't know when I became an expert is that the preponderance of the work that I ended up doing was on consumer lending rather than commercial lending. So it was really instructive for me, not from the actual lending principles themselves, I knew that, but the regulatory issues that impact lending and having a depth and breath of knowledge about them.

Q Okay. So let me just focus on your experience with regard to actual lending issues aside from the course. Could you please explain specifically what experience, knowledge, education, or training you have with regard to reading and reviewing consumer reports for the purpose of lending?

A Okay. For several years, about nine years, I

worked as a consultant to Citizens and Farmers Bank, which is headquartered in West Point, Virginia. I did teach the consumer-lending course there several times. I taught commercial-lending courses there several times.

I also reviewed the loan portfolio on an ongoing basis for all nine years, and the portfolio had consumer loans in it and it had commercial loans in it, but there was a significant amount of consumer loans. Within those consumer loan files, you had consumer credit reports. You were looking at the consumer credit report and you would be looking at an existing loan that was originated perhaps four to six months before you looked at it, and you'd see some issues on a consumer credit report, and you'd like to know, well, what happened. So I could ask a person at the bank if they could run another copy of that consumer credit report so I could see whether the situation that was an issue at the time of origination has been resolved or whether it hasn't.

So they're the kind of things that you use them for, analytical purposes, to determine what your level of risk is with respect to any type of credit you're working with.

Q Approximately, in your entire career,

approximately how many times have you looked at a consumer report in either a commercial or consumer retail loan situation, if you're able to estimate?

A I'm clearly into four figures. Several thousand. When I say several, it's not over 5,000, but 2-, 3,000. It's hard to say because I've been doing this for a long time and have seen a lot of credit and a lot of iterations, but it's a high number. Let me put it that way.

Q With regard to the list of cases that have been attached to your report, and we have discussed at your deposition that there's only a few of those where you have been designated as an expert with regard to ACDV investigations, how many of those cases are cases where you were designated as an expert on consumer lending issues?

A I would say 90 percent of the cases that I worked on were consumer lending loans and most were mortgage loans. And in each one of them, you always had a credit report and origination documents in addition.

Q All right. Have you been recognized and admitted as an expert in the area of consumer lending with regard to loan origination issues where you would review or was asked to opine with regard to a review of a credit report?

A Yes.
Q Okay. When was the last time you were so designated and admitted?
A It was 11 days ago. I was in federal court in Brooklyn, New York, on a mortgage case, and I testified for three hours on Friday morning into afternoon on it.
Q Mr. Lynn, with regard to the opinions that you offer in your report with regard to consumer lending, on the first page of your report there's a statement that says, "All of my opinions are based not only on my training and experience in consumer and commercial lending, but also my knowledge of the various federal, state, consumer protection laws and regulations that govern" --

THE COURT: I'm just going to ask you, as you read, you're going really fast, and Ms. Daffron has to type. Everybody does that. So just slow it down, please.

MR. SEARS: All right.

BY MR. SEARS:
Q Mr. Lynn, on the first page of your report you have this statement, "All of my opinions are based not only on my training and experience with consumer and commercial lending, but also on my knowledge of the

various federal and state consumer protection laws and regulations that govern consumer lending practices, policies and procedures."

Now, that statement with regard to the opinions expressed, would that apply to the opinions that you expressed with regard to the consumer-lending issues that we just talked about?

A In this particular case?

Q Yes.

A Yes.

Q In rendering your opinions with regard to whether or not there was a statement or item that was incomplete or inaccurate or misleading, what did you do to reach that opinion?

A I'm sorry?

Q What was the process you used to reach the determination that the investigation did not result in something that should have uncovered something that was misleading, inaccurate or incomplete?

A I looked at the ACDV in each case and looked at what the Credit One Bank person did, and how they reported it, and so forth, and it was verifying what amounts to factual information.

Q With regard to XB versus XH designation, how did you reach the conclusion that the XH was appropriate

to use during the time period that is the subject of the complaint?

A They stated that, by their signature, that they had resolved all the issues that were outstanding. I could see that that's what it was in reading the report, and it was their conclusion that the matter was resolved and closed, and I could see how they reached that conclusion and agreed with it.

Q All right.

MR. SEARS: Thank you.

CROSS-EXAMINATION

BY MR. BENNETT:

Q How are you, Mr. Lynn?

A Hi.

Q So we've heard conversation about the XB and the XH code. And if you can make sure I understand and the Court understands this, is it your testimony that while you were a commercial lending officer at Merrill, you become familiar with the use of the XB or the XH code?

A First, it's Maryland National Bank. So I'll just clarify for the record. And I did not become familiar with it while I was at Maryland National Bank.

Q In fact, you had never heard of an XB or an XH

code while you were at Merrill National Bank because there was no XB or XH code in existence at that time?
A That is my recollection.
Q Well, you wouldn't have known that.
A Well, the credit reports were different at that time. They didn't have FICO scores and so forth when I was there.
Q In fact, when you were there, this was 1993?
A From March 1 of 1982 to January 31 of 1993.
Q And the only thing that you would have observed would have been the end user version, right? A dumbed down version that they print out for humans to read?
A Or that are printed internally for the banker to read, yes.
Q They wouldn't have had Metro 2 coding? You don't know Metro 2 coding?
A I know what it is, but I can't tell you whether it had that formatting at that time. I just don't know.
Q But did you know what Metro 2 coding was when I took your deposition?
A I can't recall my answer. I knew it had something to do with formatting information that was presented. It was a language, in fact.
Q Well, have you read the CDIA manual that details one thing, which is what Metro 2 code is?

A I didn't focus in on it.
Q Are you aware that the CDIA manual states what the Metro 2 fields and values are and what they're to be used for?
A Yes.
Q And so you're aware that XB and XH are Metro code values for what field? How about that? What field do you understand the XB code to be a value for?
A I don't know. I can't answer that. I just know what -- the interpretation of the code itself rather than the formatting of how it's presented.
Q Right. So you're not familiar with what's called the compliance condition code or CCC field that's in the ACDV --
A I know what it is, and I know that's where the codes go. There are several different codes. I'm going to guess there are about 10 of them. They all have standard definitions to them. We just talked about two; XB and XH.
Q In fact, you know that because you learned it by reading the documents that the defendant gave you in this very case, right?
A I've had cases before, but I can't recall whether those were issues and whether I had exposure to those codes. That's what I'm saying.

Q You testified about the impact of an XB code, that that was something you derived because of your years of experience reading reports, right?
A Yes.
Q When I asked you in your deposition, "So where did you come up with that belief that an XB code blocks scoring if the dispute does not block scoring as to components of the trade line that are not subject to the dispute?" You do you remember what answer you gave this last August?
A No.
Q You said, "I believe it was Bankers Online." Does that refresh your memory?
A It's a source that is out there. It's a credible source to be used for information.
Q When I said in August 31st or, I'm sorry, whenever in August, at the deposition --
A The 25th.
Q When I said, "And when did you check Bankers Online?" do you recall what answer you gave?
A No, I don't.
Q It said, "It was within the last couple of days." And that would be truthful. You weren't lying during your deposition, right?
A No, I'm not saying that I didn't say it at

sometime previous in other cases. I simply can't recall whether I did or I didn't. You go back to refresh your memory and look for sources to illuminate the particular issue at hand.

Q Now, you understand that even if you were working at Merrill National Bank --

A Maryland. The state of Maryland.

Q Maryland? Okay. So if you were working at Maryland National Bank today as a commercial banker --

THE COURT: Let me be clear. Doesn't the deposition say "Merrill"?

MR. BENNETT: It does.

THE COURT: So the deposition is entirely wrong. It says, "Merrill."

MR. BENNETT: Correct. In fact, Judge, my initial briefing, when we were doing drafting, I said "Maryland," and we corrected it because of the deposition.

THE COURT: I want to be clear, Mr. Sears. Is it Merrill or Maryland? I have a deposition that says "Merrill."

THE WITNESS: I can be helpful here. It is Maryland, the state of Maryland, spelled the same way. That is the name of the bank. I worked there for 11 years. It's Maryland National Bank.

THE COURT: All right. Well, somebody should read the depositions and fix them.

THE WITNESS: It is now part of Bank of America. I think you were going in that direction. Just for clarity.

BY MR. BENNETT:

Q But you didn't fill out an errata sheet. You had an opportunity to make any corrections to your transcript, right?

A No, I didn't fill one out.

Q Now, you would have -- even if you were at Bank of America today, you understand, you may not know, but that you would not, as a commercial lender, ever see XB or XH, I'm doing air quotes around those, you wouldn't see those?

A I don't know. I'm not there. So I simply can't answer.

Q Do you know if any bank version of the credit reports or the bank version of credit reports for any year from 1993 to the present would have included XB or XH coding?

A Again, I can't recall.

Q Your explanation of XH code that is in your report, you took out of the CDIA manual that Mr. Sears gave you in this case?

A That's correct.
Q Not out of your own expert memory, right?
A Yes. I'd like to clarify one point.
MR. BENNETT: I'd object, Your Honor.
THE COURT: You'll have redirect.
BY MR. BENNETT:
Q I'm sorry. Let me just be respectful. What point would you like to clarify?
A A lot of times we do not focus on the XB or XH, but you focus on the description, account currently in dispute or account was in dispute now settled. So you're looking at the verbiage that describes the account rather than the actual code.
Q Well, you understand you're under oath being examined by somebody who knows what those codes mean, right?
A Yes.
Q You are not representing to the Court you have a belief that an XB code translates to any particular text in the end user report, are you?
A No. It's an interpretation by the end user, such as a lender such as myself, looking at a credit report in its totality and looking at notations where an account may be in dispute and is still in dispute or an account that was in dispute and it has been

resolved. That's a qualitative judgment that you make in the evaluation of the credit capacity of an individual.

Q Let me make sure we understand each other. You understand that when a credit furnisher reports data to credit reporting agencies, it uses a particular code?

A That's correct.

Q You learned in your deposition that that's called Metro 2 code, right?

A Yes.

Q And that Metro 2 code would include a field that would include a dispute status like XB or XH or any others?

A Yes.

Q Now, you cannot testify, you certainly won't represent yourself as an expert to testify, that you know how the credit reporting agencies convert, translate and output the information they receive with an XB or an XH or other dispute code?

A No, I just know what the end user -- what I see in an end user report and what that information states.

Q But you don't know how you got there? You don't have any expert knowledge to know if there's an XB code, then what happens, right?

A I don't follow you.
Q Well, you don't have any knowledge as to whether a credit reporting agency even furnishes an XB code?
A I just know what I read on the final statement. That's what I'm saying.
THE COURT: No, that wasn't his question.
THE WITNESS: I'm sorry?
THE COURT: His question was: Do you know if every furnisher uses XB?
Was that your question?
MR. BENNETT: It wasn't, respectfully, Judge.
THE COURT: Okay. Good.
MR. BENNETT: Obviously, my question is not working here.
BY MR. BENNETT:
Q You know what an end user report looks like because that's the only part of this credit reporting question that you have used, right?
A Yes.
Q You don't know how you get or what happens when there's an XB code or an XH code to get to whatever is in an end user report, right?
A Right. It just has the statement, the descriptive statement of what it is. That's my experience in looking at these credit reports when I was working at

Citizens and Farmers Bank and when I've been a consultant at other banks. That's what I'm saying to you. And you take that information along with all the other information and data and so forth in a credit report and make a judgment as to the credit worthiness of a person whose credit report you're looking at.

Q Let me try it this way: You understand or you have learned as part of this process that if the defendant had reported Mr. Wood's account with an XB dispute status, meaning he has made a dispute under the Fair Credit Reporting Act, you understand that that account would not have hurt his credit score. You've learned that, right?

A That's my understanding.

Q Okay. So you're not offering any expert testimony to suggest what the proper way to report a dispute code is, not as a consumer-lending expert, right?

A I'm just talking as an end user of a consumer report.

Q All right. So if you saw a report that noted an account as disputed, that would not hurt a consumer's credit file, right?

A No, it's noted. It's information.

Q Okay. But you're not offering yourself as an expert to testify about when it is proper or improper

to use one dispute status code over another?
A I just evaluate it when I looked at the ACDV, saw that they could come to a conclusion, saw how they did it, and opined accordingly.
Q Mr. Lynn, Mr. Sears has divided your supposed expertise into these two categories, those two buckets, and we're talking now about consumer lending. Your consumer-lending expertise you offer relates to how you read end user reports, right?
A That's correct.
Q You're not suggesting that your consumer-lending expertise makes you an expert on when it is correct or incorrect to use a particular X code?
A I just understand how it was arrived at.
Q All right. And the --
THE COURT: What does that mean? "I just understand how it was arrived at."
THE WITNESS: How -- I look at the code that was assigned. I look at what the analyst did, the information they confirmed, and so forth, or information they changed. So their obligation is to either correct it, delete it, or leave it alone if it's accurate. So they've gone through the entire ACDV and have made, by their own investigation, have looked at it, reviewed it, used whatever sources of

information that they have, and came to a determination. I could understand what they did and how they did it.

Q You're not suggesting you're an expert to testify about whether it was -- whether the defendant complied with industry standards in how they used one X code versus another?

A I saw the XH code. I saw what it meant. I saw what they did. And I understood what the logic of their reasoning was.

Q So what you're saying is you read the ACDV dispute document of Mr. Wood's dispute that Mr. Sears gave you?

A Yes.

Q You compared that to the glossary in the CDIA manual that Mr. Sears gave you?

A Yes.

Q And you read the deposition of the defendant's employee defending itself, right?

A Yes.

Q And then that's how you reached your conclusion?

A And I also had that in the Credit One Bank policy manuals and other manuals. So it's the same information. So I understood how they did it.

Q Mr. Lynn, we're having the same problem we had at

your deposition, and we're going to be well past the time.

MR. BENNETT: And, Your Honor, I apologize.

BY MR. BENNETT:

Q If I could continue this after the hearing. But I'm trying to understand why you believe you're an expert. I'm not asking whether or not you read the documents Mr. Sears gave you to read because I assume you're an excellent reader. You are a good reader, right?

MR. SEARS: Objection, Your Honor. Argumentative.

THE COURT: So I'm going to overrule this. He used a phrase, "industry standard," so I'm overruling your objection.

MR. SEARS: Okay.

THE COURT: So I need to understand from you, sir, what is your baseline, what's the industry standard, and can you articulate it to me? Not what happened here. He's asking you what industry standard did you use. And you're saying, Well, I looked at the Credit One Bank manuals.

THE WITNESS: It's defined.

THE COURT: Okay. So say it.

THE WITNESS: Okay. It's defined. There's a

definition for XH. There's a definition for XB.

THE COURT: So that's not the question. Something defines it as XH and XB.

THE WITNESS: Right.

THE COURT: What? What defines it?

THE WITNESS: Again, it's the analyst looking at it.

THE COURT: No, no, no. What defines XB and XH in a manner that sets an industry standard? So no matter who is looking, not that analyst, not the two analysts here, some analyst in California. So if someone in California is looking at XH and they do something that means they deviated from what could possibly be an XH, what defines what they're deviating from?

THE WITNESS: I don't know if I can answer that.

THE COURT: Well --

THE WITNESS: Most analysts that are looking at this, regardless of the institution they are working for, they are looking at the same data. They are experiencing this. It's objective data. They should come to the same conclusion. They're looking at verifying a name, verifying an address, verifying a Social Security number, verifying a date of birth,

verifying payment information. It's objective data.

If they have a difference with it, that's in their system. Now, you could have differences at different points in time. But if the same two people were looking at the same information, they should come to the same conclusion is what I'm saying.

THE COURT: The question is: What defines what is a proper verification?

THE WITNESS: They looked at every line of inquiry that they were supposed to look at and review and evaluate. They've come to a conclusion whether it was accurate or inaccurate.

THE COURT: No, no.

THE WITNESS: I'm sorry.

THE COURT: How do they come to the conclusion?

THE WITNESS: It's objective data.

THE COURT: If I look up on Google Maps and there's somebody who's named Jane Doe, and Google Maps says to me, or Zillow says, "Jane Doe lives here."

THE WITNESS: There are rules for that. There are rules in the manual that explain that.

THE COURT: Which manual?

THE WITNESS: I think it's in the CDIA manual. And I think it was also carried forward to

the Credit One Bank manual. I remember reading that. They were the exact same point. If the name is slightly different or it didn't include a junior or a senior or something like that, how do you deal with that? So there are rules describing what you should do and how you should do it.

BY MR. BENNETT:

Q Are you testifying under oath that there is anything, a sentence or more, in the CDIA manual about how to verify substantive information in a credit dispute?

A What do you mean by substantive?

Q Is there anything in the CDIA manual about how to conduct a proper reinvestigation?

A I don't have the CDIA manual in front of me. My recollection is that, as I've just described for the Court, that there are rules on how to evaluate certain information that is slightly different.

If everyone sees the same name, John Smith, they should come to the same conclusion. If it has a middle initial or something, that's another issue.

MR. BENNETT: I object. It's not responsive to the question.

THE COURT: We're done. We're done with that line of questioning.

BY MR. BENNETT:

Q Now, any of this knowledge of which you've just opined about following the right instructions in whatever manual may have it, you admit that anyone capable of reading those manuals could reach the same conclusion that you now offer, right?

A They should, yes.

Q Now, you testified on direct about what is this? Citizens something?

A Citizens and Farmers Bank. It is headquartered in West Point, Virginia.

Q You actually wrote your C.V. and bio and expert witness report in this case yourself, right?

A That's correct.

Q And, of course, you sat through an excruciatingly long deposition where I asked you questions repeatedly about why you believed you had any knowledge about what the rest of the banking world did, right?

A Yes.

Q And you have never until today mentioned that bank in either your deposition or in your C.V. and expert witness credentials, correct?

A I believe that is correct.

Q Now, when I asked you in your deposition -- by the way, when we started discussing the CDIA in your

deposition, do you recall you weren't even sure what the CDIA was, right?

A I can't recall.

Q And you testified that as well today that you taught 15 times you taught courses in consumer-lending program, correct?

A Yes.

Q But in your deposition when I asked you, "You don't know what materials that would have regarded a furnisher's obligation to conduct a dispute under 1681S-2B you might have had access to?" the best you could answer was you didn't recall because it's been a long time, right?

A Yes.

Q You are not suggesting to the Court that you learned in the 15 opportunities to teach industry employees, you're not here representing to the Court that you can testify under oath that you gained any knowledge about a furnisher's credit reporting obligations or fair credit reporting obligations as part of that process, right?

A Again, I --

MR. SEARS: If I may object. It goes beyond the direct examination. He's getting into the qualifications regarding ACDV investigations. The

direct examination was just dealing with consumer lending.

MR. BENNETT: I don't have other questions, Judge.

Thank you, Mr. Lynn.

THE WITNESS: You're welcome.

THE COURT: Do you have any redirect?

MR. SEARS: I don't have anything, Your Honor.

THE COURT: Mr. Lynn, I'm just going to ask you one question so the record is clear.

THE WITNESS: Yes, ma'am.

THE COURT: I'm going to look at one document before I do. I'm sorry.

I don't see any reference to this Citizen and Farmers Bank in West Point. What was your role there?

THE WITNESS: The bank?

THE COURT: Yes.

THE WITNESS: Citizens and Farmers Bank.

THE COURT: Okay. In West Point?

THE WITNESS: It is located in -- its headquarters are in West Point. I think that's a technical point now because they've moved all of their executive offices out to Toano, and that happened about 10 years ago. But I think technically the

stated headquarters of the bank is still in West Point.

THE COURT: And what was your role there?

THE WITNESS: I'm sorry?

THE COURT: Your role there.

THE WITNESS: I was consultant to the bank for nine years. I did what is known as credit review. Credit review is examining loans that have been booked and other related loans to an existing borrower, to evaluate the quality of the underwriting, and the adequacy of the cash flow and other qualitative measures, and assess the risk that's inherent in the credit relationship itself. I did that.

I taught the consumer lending course. I also taught a commercial lending course there. I wrote their -- drafted, I should say, their commercial and consumer lending policy. That was back in 2001.

I set up their, what we call, watch committee, which is a process to -- it dedicates special attention to what are known as special assets, which are troubled loans and protocols to monitor and assess such credits on an ongoing basis. I did that for them.

That's probably about it. The ongoing task was really the credit review I just described. I did

that all nine years.

THE COURT: What were the nine years?

THE WITNESS: From January 1 of 2000 to December 31st of 2008.

THE COURT: All right. I just want to be clear. It's not the case that you know any of our affiants from West Point, is it? Sergeant Woodson?

THE WITNESS: No, I don't know any of them. I don't know the plaintiff and I haven't discussed it with anybody at the bank.

THE COURT: All right. That's all I have.

MR. SEARS: Thank you, Your Honor.

THE COURT: Thank you, sir. I appreciate your time.

(The witness was excused from the witness stand.)

MR. SEARS: Your Honor, I don't have anything further on this particular motion unless the Court has any further inquiry.

And just for the record, I concur with plaintiffs' counsel suggestion. I have no objection to the Court ruling on the cross motion for summary judgment on the briefing unless the Court would like an oral one.

THE COURT: All right.

MR. BENNETT: Your Honor, the only -- with respect to -- we talked a long time about Mr. Lynn, but just for the record, as my reply or rebuttal, if I could just note the Court, direct the Court -- of course, the Court has obviously read the transcript, but I floundered looking for where the discussion of industry standard was concentrated. I found that, which starts at page 123 and continues for at least the next two pages, through 125, with me attempting to discern the industry standard. That is where I discussed it expressly. Previously, I just said, Here's the index with the word industry. Otherwise, I agree with counsel that we're certainly glad to argue summary judgment, but also glad to have the Court decide it on the briefing.

THE COURT: All right. Well, I am also glad to decide it on the papers, but let me just review and make sure I didn't have any questions. I want to be sure I asked you all.

I do want to ask a couple of questions. I'll try to be brief for everybody's sake.

Mr. Bennett, can you approach, please?

MR. BENNETT: Yes, Judge.

THE COURT: I want to be sure I understand your argument and your motion for summary judgment.

You're seeking summary judgment on three issues, correct?

MR. BENNETT: Yes, Your Honor, and you could see that based on our numbering; one, two and four.

THE COURT: I saw that. But I would never have raised it.

So the issue I want to make sure of is what relief are you seeking? So you say it's a partial motion for summary judgment.

MR. BENNETT: Yes, Judge.

THE COURT: Are you seeking dismissal of any counts? What you do you want?

MR. BENNETT: Yes, Judge. So the first -- the accuracy is, we think, critical and strategically the most important from our perspective because we want to make sure there's no jury nullification, familial identity theft where people blame the victim because in was the, in this case, the estranged mother, is always difficult.

In the *Alvaran* case, for example, before Judge Dohnal --

THE COURT: That's A-l-v-a-r-a-n?

MR. BENNETT: Yes, Your Honor.

THE COURT: That is a Judge Dohnal case.

MR. BENNETT: A Judge Dohnal by consent. And

in that case, our similar concern was that we had a husband or ex-husband and the then ex-wife had used the credit card, opened it and used it in the husband's -- during the marriage. And, similarly, in the *Mullins* case, which I don't know that we cite, the *Mullins v. TransUnion* case, was a case before Judge Payne where, again, it was the wife using the husband's account as an authorized user card. And it's those where the defense strategy is to blame the victim or to suggest that there's something sneaky when, as lawyers, and with a court of law the law of whether or not the consumer is obligated is set by what the consumer did.

Here there is no dispute about the following facts. Well, let me finish answering your question. So with respect to accuracy, we are asking partial summary judgment, for the Court to find that the defendant's credit reporting that said that Mr. Wood owed, opened, and used this account was inaccurate.

The defendant acknowledges that's the very first element of a Fair Credit Reporting Act case like this one. So the jury should not be tasked with deciding whether our client was the applicant who was contractually obligated by some hey-you're-related-to-the-mother theory.

So the evidence here is undisputed, and I mean undisputed. You've read the defendant's brief. And I'd qualify it if there's two sides. There is no dispute that there's not a piece of paper ever signed by my client. There is no dispute that there's not a charge that my client made or that the defendant could have any proof at all that my client made.

There is no dispute that the post office box at which the mail was sent belonged to the estranged mother. The family received mail there, but it was not our client's. There's no factual dispute of those things. There's no factual dispute that the defendant has no documentary evidence at all that connects our client to any charge, to the application, to any payment.

In *Alvaran*, the consumer victim actually had made the payments, same with *Mullins*. Here it's even clearer. There is no evidence of that at all. And we've been in discovery with a summary judgment exchange here that has --

THE COURT: Well, okay. So I think I understand that. And so one issue is, I know there's this issue about somebody calling and checking in, the voice didn't match, and you all continuing to brief it saying it's a woman, and there's really no

evidence that it's a woman. It's just that the voice doesn't match. I get that.

What is the upshot of that? It becomes an instruction to the jury? What are you saying?

MR. BENNETT: Yes, Your Honor. So, for example, the *Mullins* case, the way it played out is Judge Payne issued a short one -- sometimes courts spend a lot of time on summary judgment and sometimes they say it's just a big mess of facts. I'll leave it to the jury. Judge Payne is very meticulous, as you know, but in this instance it was more the latter.

Then we got to the jury trial and these facts arose. So Judge Payne had to provide a jury instruction to the jury that said, "I am instructing you that the information is inaccurate." And you did that by motions in limine practice. So that we did it twice. We didn't succeed at summary judgment. We didn't have a ruling against us. There was no ruling. But then on the motions in limine battle at the final pretrial Judge Payne said, All right. What are your -- defendant, what basis do you have to conclude that the plaintiff was liable or that the reporting was accurate? There wasn't any. It was the same as here. And he then provided that instruction and barred the defendant from arguing that that's so.

Now, this process is, I think, the stronger, I mean, the proper one. It's a summary judgment question of accuracy. You have all the paper that -- almost a year of litigation or more of litigation have offered, and at this stage, given that you have a Virginia Code and federal law --

THE COURT: What's with this about this contract bury? I've never seen a contract bury in a FCRA case. This is brand new to me. What case has ever applied that?

MR. BENNETT: Well, the question is -- here's how we -- well, we cited --

THE COURT: You cited non-FCRA cases for general contract principles, and that it was a unilateral contract.

MR. BENNETT: What we're left with -- I mean, we do have the Virginia Code on credit cards and the Federal Code on credit cards that both say that mere use of an account doesn't subject a consumer to liability.

THE COURT: Right. I got that.

MR. BENNETT: But the contract theory, I'm not -- it's not on my list of arguments to make, but it seemed like a good one to leave in there. I'm gathering it won't in our attempt to get 30 pages or

less, but next time around.

I will say that with respect to -- the challenge that we face like this or any identity theft victim faces is proving a negative. And in the Johnson case where it all began, for me anyway, the actual argument that my opponent made at trial was it's not our, MBNA Bank's at that point, obligation to prove that you owed it. It's your obligation to prove that you didn't, which proving that negative is challenging.

That's not, of course, the law because the defendant is making affirmative reporting. We have a declaration from Mr. Wood that says, "I didn't open, use or authorize the account," and that should be the end of it unless there's some factual basis to say Mr. Wood's declaration is wrong. Here's a credit card slip with his signature on it. Here's an application. It was an Internet online application, Judge. And so there's no evidence, zero, nothing. There's not a statement by him in their account notes that says, Yeah, it's my account. There's nothing. Zero. Zero point zero zero.

This is not a matter of arguing that there is --

THE COURT: All right. I think I get the

point.

MR. BENNETT: All right. And it's critical because the defendant's strategy has been to blame the victim. Even the attempt to use the Woodson declaration is to say, Well, she didn't believe that he didn't open the account. And what purpose would that offer? The defendant would suggest to a jury, So you shouldn't believe that. Even though there is no evidence to the contrary.

It would strain our ability to bring cases here if we brought a case where somebody actually just opened the account and we didn't vet it. I mean, this gentleman did not open the account. We have litigated that to no end. And there's no evidence to the contrary.

THE COURT: All right. So there are others that are bringing that, and then you're saying failure to conduct reasonable investigation, failure to truthfully report the results. Those are the other two bases, correct?

MR. BENNETT: Correct, Your Honor.

THE COURT: Are you trying to get any counts dismissed?

MR. BENNETT: We are trying to have the Court find as a matter of law the defendant did not

report -- did not conduct an investigation.

THE COURT: Which counts do they go to? You have three counts; Six, Seven and Eight.

MR. BENNETT: Yes, Judge. Count Six, Your Honor, is what I would call the Johnson or investigation count, which is the defendant conducted absolutely no investigation at all. Johnson said, This is what -- define investigation. You have two words. And the one where it's a tougher time for us on summary judgment is if we're having a battle about what is reasonable because that's so fact based, right? The law would say this is not reasonable.

And Johnson said, in that case, Judge Williams was correct to allow that to go to a jury. So that doesn't end the battle for us, right? But you also have other decisions.

You do have the Southern District of Mississippi case in *Robertson*, 2008 Westlaw --

THE COURT: I'm really just trying to -- I think I get -- I've read your cases. I don't want to make you do a whole argument.

MR. BENNETT: I'm sorry.

THE COURT: What I want you to do is tell me what you, in your perfect world, if you win these motions, what happens.

MR. BENNETT: If we win our motions, we go to the jury on the single question of whether the defendant's violation of the Fair Credit Reporting Act was willful and what damages are appropriate, if any.

THE COURT: Okay. So which of your theories goes to Count Six, and which goes to Count Seven, and which goes to Count Eight?

MR. BENNETT: Yes, Your Honor. The correctly numbered two, Credit One Bank failed to conduct a reasonable investigation is Count Six.

THE COURT: Okay.

MR. BENNETT: The incorrectly numbered four, but the third argument, Credit One Bank failed to truthfully report the results of investigation goes to Count Eight. And that's it. I combined C and D now. So Count Eight, which is the defendant, had it done an investigation at all, would have at least known that there was a dispute.

THE COURT: Okay. So here's my question. What goes to Count Seven?

MR. BENNETT: At trial we would argue that the defendant failed to consider the plaintiffs' disputes, but we're not seeking summary judgment on Count Seven.

THE COURT: That's all I'm trying to ask.

MR. BENNETT: Yes, Judge.

THE COURT: All right. So that's all I have questions about your motion. And then I'll ask your opposing counsel about that motion.

MR. BENNETT: Yes, Judge.

THE COURT: All right. So I just have a couple of questions for you. You indicate that you are disputing that Wood didn't open the account, correct?

MR. SEARS: Did open the account.

THE COURT: No, you're disputing --

MR. SEARS: I believe, just to be clear on this, number one, the plaintiff has the burden of proving the elements necessary for the claim. And one of those would be that his identity was in fact stolen, and it resulted in an account being reported incorrectly.

And on that burden, the only testimony that exists either way is Mr. Wood's own testimony. But in addition to the burden of proof, he also has the burden of persuasion. And I believe that -- and I outline this in the -- I won't go into the specifics because it is in the briefs -- that based upon different facts of the case, a jury could draw an inference that Mr. Wood's claim of identity theft is

not a bona fide claim.

Sergeant Woodson drew or came to that conclusion based upon the evidence that was presented to her, and if she can reach that, then I think that based upon the evidence in the case, the jury could as well.

THE COURT: All right.

MR. SEARS: We don't have direct evidence to counter to say no, you didn't have your identity stolen, but at the same time the burden is on him, and the jury needs to assess his credibility.

THE COURT: All right. So where do you get the good faith belief you're referring to? That's just a phrase you're using?

MR. SEARS: That's a phrase my client used in responding to the interrogatories, Your Honor.

THE COURT: Hopefully, your client signed them.

MR. SEARS: Yes.

THE COURT: So are you disputing that the opening of the account was entirely electronic, that there's no handwritten signature?

MR. SEARS: Oh, no. No, it was done electronically. In my reply brief I believe that I make reference to -- I believe it's kind of a

distraction, a red herring we would call it back where I'm from, that this whole issue of contract law under Virginia law, but if you're going to go down that route, Virginia recognizes electronic signatures, which is it can be more than just a digital signature. It can be processes and so forth.

THE COURT: But you're not even saying that happened, right?

MR. SEARS: No. What I'm saying is that somebody did it.

THE COURT: Is there an electronic signature?

MR. SEARS: I'm sorry?

THE COURT: Is there an electronic signature?

MR. SEARS: There is an electronic mechanism where someone went online to apply for the account, yes. Someone -- my understanding, I could be wrong, my understanding is they went online to apply for the account, filled out the information, was mailed the card, and then they called in to activate it. The card was not just sent to him. We sent a solicitation. Someone returned the solicitation by process of an online application.

THE COURT: And it's not the case that you know who actually did the purchases. You didn't -- certainly I know your folks didn't do that, but you

haven't tried to verify who did the 300-dollar purchases anywhere, right?

MR. SEARS: I've tried. I haven't had much luck there.

THE COURT: All right. I read something in your brief, and I'm trying to understand, and, unfortunately, I can't remember exactly where it is, but you indicate that there is no claim for FCRA inaccurate reporting and you cite *Davenport*?

MR. SEARS: Yeah. Basically, the -- and it's in two places. So I make reference to it in response to their motion for partial summary judgment and their defining of the seminal issue being, hey, we have to prove an inaccuracy. That's really not a correct statement.

The cases, and if you look at, actually, the analysis of 1681A and 1681B, whatever the first part of that statute that's at issue here, I don't have the cite in front of me, but even for an accurate reporting, there is no private cause of action, okay? There is -- the duty is on a data furnisher to report information that is correct and accurate based upon what they know. And I don't have the statute in front of me because I was doing it by illustration. Let me see if I can find -- I want to direct the Court

correctly here. So this is on page 15 of 22, Section 1681S-2A.

THE COURT: Page 15 of 22 of your brief?

MR. SEARS: Of my response to plaintiff's motion for partial summary judgment.

THE COURT: All right.

MR. SEARS: I can explain it to you if you'd like, but it's also written here. Data furnishers are not permitted to furnish information that they know or have reasonable cause to believe that the information is inaccurate. And the violation of that does not give rise to a private cause of action. There's only administrative enforcement. Okay?

So the fact that --

THE COURT: Wait. What page are you on?

MR. SEARS: I'm on top of the page, document 68, page 15 of 22.

THE COURT: Okay.

MR. SEARS: Okay. So under 1681S-2A, if I'm reporting inaccurate information, a consumer cannot sue me as a data furnisher. I have a duty to report any consumer reporting agency if the data furnisher knows or has reasonable cause to believe that the information is inaccurate.

THE COURT: Now, you're reading again.

MR. SEARS: Sorry. Yes, I'm sorry.

And so under 1681S-2B, which is what this lawsuit is brought over, okay, it's not that there is an inaccuracy in the reporting, it's that there was -- a person has a duty to conduct a reasonable investigation. And for there to be liability, it's not enough to prove that the report that you have is inaccurate. What you have to prove is that it is inaccurate because the data furnisher did not conduct a reasonable investigation, and if they would have, they would have discovered the inaccuracy, and then they would have had an obligation under the law to correct that in the reporting.

And that is exactly what *Johnson v. MBNA* is about. That is exactly what this *Robertson* -- I think it's *Robertson*. I think it's a wonderful case. I'm so glad that they brought it up because it perfectly illustrates how this is supposed to work. Yeah, *Robertson v. J.C. Penney Company*.

In that case, the consumer made a payment on a J.C. Penney account.

THE COURT: Right. I've read that.

MR. SEARS: So if they would have looked, they would have seen it. They didn't look, so they are liable. That's what this is really about. It's

not about whether or not it's inaccurate. It's about whether or not an investigation is reasonable -- would have shown that it's inaccurate.

THE COURT: All right. Okay. So I think I understand.

MR. SEARS: Okay.

THE COURT: Let me tell you this, though, sir. I want you to be aware that perhaps the reason your client is challenging this is that what the plaintiffs here are saying is that your business model is unreasonable.

MR. SEARS: I understand that's what they're saying.

THE COURT: And so one thing you have to accept is if a judge agrees with that, then every other aspect of your arguments fall. And so I want you to know that as I read *Davenport* and *Johnson* and *Robinson*, I'll issue a written opinion, but I see different cases than you're describing, and I'm pretty familiar with those cases.

It's because in what *Alvaran* and what *Johnson* is talking about is that there is some requirement that the system not to be unreviewable. So, for instance, in *Alvaran*, the whole issue for Judge Dohnal was that there was no original signature card. There

was no way to check because the business system set it up in a way that they just didn't have it available.

And so if there is an IP address that can identify exactly where a message came from in order to set up an account that somebody becomes liable for without any other kind of signature, not knowing the IP address is a difficult place for your client to be because that is singular. Now, it can be a singular computer in a shared home. It doesn't really help anything. If it's a cell phone that somebody owns and uses primarily, that's a make or break kind of fact, but not knowing it one way or the other and not having a business system where it's discoverable or checked, I'm struggling with, but I'll review what it is.

MR. SEARS: And, Your Honor, that kind of sounds to me like a strict liability argument, which is not what is contemplated.

THE COURT: It's not an argument when I make it actually. It's something you appeal.

MR. SEARS: Okay.

THE COURT: So I am saying that I'm going to look at it, but I'm pretty familiar with these cases, and I hope your client is really understanding what he or she is doing. Which client signed the papers? Do you remember?

MR. SEARS: The corporate representative.

THE COURT: Who signed the interrogatories?

MR. SEARS: It would have been either Helen Lanham or Kim Maragos. I believe it was Ms. Lanham.

THE COURT: All right. Well, I'm struggling with the theory of the case as presented, but I'm going to certainly issue an opinion, and I want to make sure I look at your motion to see if there are any questions there that I need to address.

All right. So, just with respect to your motions, I think I understand the basis of the motions that you placed in front of the court, and I noted that you expressed remorse for not having listed undisputed facts.

I'm going to say to you, especially in an instance where you then called the other side on whether or not they have specifically adhered to 1746, really think about what you're placing in front of the Court. If you want to win on technicalities, don't make them lose on technicalities. Right? So I'm going to say that to you by way of introduction.

And I am going to tell you that the notion of setting up disputed material facts matters for the reason that was raised by the plaintiffs, right? They said, Listen, they don't list any facts out. Now we

have to list them out and respond to them, and then you dispute their facts. You're functionally inverting how that motion is supposed to come together altogether. And signing things pursuant to Rule 33(a)(1), making sure your client knows what the heck he or she is making himself or herself liable to, reading Rule 56, and what the disputed and undisputed facts are, all of those drive the efficacy, the efficiency, and the fairness of how cases come together in this court.

I'm maybe especially bothered because as you don't do this, you then say they don't use the phrase "true and correct" when the guy swears to something under oath. That is troublesome. And so I'm going to tell you in the first instance not appearing is something I'm going to have to look at. You cite language about whether we say how material it is, and how much issue, and I clearly have plenty of facts in front of me, and I see that you argue that causation about -- you make an argument about damages and your argument about the fact that they failed to articulate damages, I'll tell you, you don't respond to their argument about the *Sloan* case at all. You raised *Robinson*, which is a case that allowed damages on testimony of an individual person, and you cite

Robinson in a way as if it sounds as if it might overturn *Sloan*, and so I'm confused about that.

I know you have 50,000 cases. So does anything come immediately to mind?

MR. SEARS: It does not.

THE COURT: All right. Okay. I mean, you all are going to have to file something. They would object if you filed something about *Robinson*, but you can place a one-page statement, and they can respond a one-page response, along with your certifications about who signed the interrogatories.

I think that may be all I have to say. I think you have to address *Sloan*, and the way you represent what this court found in *Robinson*, it's not persuasive to me.

MR. SEARS: Okay.

THE COURT: All right?

MR. SEARS: Thank you, Your Honor.

THE COURT: All right.

Mr. Bennett, do you have anything?

MR. BENNETT: No, Your Honor.

THE COURT: All right. So this is what I'm going to do: First of all, let me apologize to the folks in the next hearing. I know that I've gone over, and I know that everybody is busy.

I'm going to issue my written opinion. I'm going to issue it no later than the 31st. That will give you all time to submit whatever your one-page thing is. What's today? Tuesday. I'd like that by Friday. If you need more time, I guess you can get more time, but I don't see why you'd need more time for what I've asked you.

I will rule on all the issues, and upon the ruling, we will immediately address what needs to happen next in the case.

I might encourage you, if I were a different kind of Eastern District judge, to talk to Judge -- whatever judge is handling your settlement. I certainly have given you an indication about issues that might help you value your case. I've tried to be as forthcoming as I can without coming in predisposed to absolutely rule one way or the other.

MR. BENNETT: Your Honor?

THE COURT: Yes.

MR. BENNETT: If the defendant -- originally, you suggested that we both file position as to the verifications. The most recent comment the Court offered was that the defendant would file as part of its -- of that process it would do a one-page explanation of the incongruence between the

presentation of *Sloan* versus *Robinson*, when we would respond to that.

THE COURT: All right. So, Mr. Sears, if you could do your statement about verification and your one-page comment about *Sloan* and *Robinson*, if you wish, by Friday. If you all could respond on -- what is the number on Tuesday?

MR. BENNETT: We could do it by Monday, the 24th.

THE COURT: Monday is better. What day is that?

MR. BENNETT: The 24th.

THE COURT: The 24th. And I won't rule more than a week after that. All right?

Does anybody have any questions?

MR. BENNETT: No, Your Honor.

THE COURT: I appreciate everyone's good efforts and your time, and I promise it will be a short recess before the next hearing. I'll allow you time to set up, though.

Thank you very much.

(The proceedings were adjourned at 2:40 p.m.)

I, Diane J. Daffron, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/

DIANE J. DAFFRON, RPR, CCR DATE